

New York University Medical Center, New York University Medical Center, a Division of New York University and Association of Staff Psychiatrists, Bellevue Psychiatric Hospital. Case 2-CA-28305

October 31, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 21, 1997, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief in response to the Respondent's exceptions, and the Respondent filed a reply memorandum.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt there recommended Order.

¹ We deny the General Counsel's motion to reject the Respondent's memorandum of law in support of its exceptions. Contrary to the General Counsel's contention, the memorandum was hand-delivered to the Board before close of business on June 18, 1997, the due date, as provided in Sec. 102.111(b) of the Board's Rules and Regulations. The Regional Director was served by overnight mail, before the close of the next business day, June 19, 1997, pursuant to Sec. 102.114(a) of the Board's Rules.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening implicitly to punish employees with layoffs, cutbacks, and other consequences, we rely on credited testimony showing that Dr. Trujillo: (1) told Dr. Portnow that Dr. Mahon's behavior was "disgraceful, disloyal, undesirable and that it would lead to 'trouble' for the attendings, [i.e., attending physicians]" following a meeting early in October 1994 regarding the so-called 9 to 3 issue, during which Dr. Mahon spoke out against the Respondent's proposed changes; (2) told Dr. Portnow that the Association would be "punished" for its position on the 9 to 3 issue, that it [9 to 3] was a political issue, and that the doctors should have taken the Respondent's offer to renegotiate their worktime to eight-tenths; and, (3) admitted that he told Dr. Weiss and others that having the 9 to 3 issue made the Association and its members "very visible for the chopping block." We agree with the judge that these statements, especially when viewed in the context of Trujillo's many other statements of animus toward the Association and its officers, reasonably would have been interpreted by the doctors as threats. We do not rely, however, on the judge's finding that Dr. Trujillo's contention that he was merely trying to warn the doctors of the budget consequences that might result from failure to resolve the 9 to 3 issue was "irrelevant." In this connection, we note that the judge discredited Trujillo's testimony.

³ For institutional reasons, Member Higgins agrees to apply the precedent of *Management Training Corp.*, 317 NLRB 1355 (1995).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, New York University Medical Center, a Division of New York University, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

In this regard, he notes that a Board majority has adopted and consistently applied the principles of that case.

Gregory B. Davis, Esq., for the General Counsel.
Richard Semeraro, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of a charge and amended charge filed on March 29 and September 1, 1995, respectively, by the Association of Staff Psychiatrists, Bellevue Psychiatric Hospital (the Association), against New York University Medical Center, A Division of New York University (the Respondent), a complaint and notice of hearing was issued on October 19, 1995, alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). By answer timely filed, the Respondent denied the material allegations in the complaint and raised certain affirmative defenses.

A hearing was held before me from March 18 through April 1, 1996, in New York, New York. Subsequent to the closing of the hearing, the General Counsel and the Respondent filed briefs.

Upon the entire record and the briefs of the parties, and upon my observations of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material, is and has been a not-for-profit corporation, with offices and places of business in New York, New York, including a place of business at Bellevue Psychiatric Hospital (Bellevue), and engaged in the provision of medical and patient care services for hospitals in New York, New York, including Bellevue, through affiliation agreements with the New York City Health and Hospitals Corporation (HHC). The Respondent annually in the conduct of its business operations, derives gross revenues in excess of \$500,000, and purchases and receives at its New York, New York places of business goods and supplies valued in excess of \$50,000 directly from points outside the State of New York. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. THE ALLEGED LABOR ORGANIZATION INVOLVED

Section 2(5) of the Act defines a labor organization as:

any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose,

in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

In *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959), the Supreme Court held that an employee committee that discussed with management various subjects pertaining to working conditions, wages, or grievances was a labor organization within the meaning of Section 2(5) of the Act even though the committee had no membership requirements, collected no dues, had no funds, and had never attempted to negotiate a collective-bargaining agreement. Following the liberal scope granted in *Cabot Carbon*, the Board and courts have broadly construed the definition of labor organization under Section 2(5) of the Act. *Prime Time Shuttle International*, 314 NLRB 833 (1994); *E. I. du Pont & Co.*, 311 NLRB 893 (1993); *St. Anthony's Hospital*, 292 NLRB 1304 (1989).

Moreover, in *Electromation, Inc.*, 309 NLRB 990 (1992), the Board indicated that the elements required of a Section 2(5) organization are: (1) employee participation, (2) a purpose to deal with employers, (3) concerning itself with conditions of employment or other statutory subjects, and (4) if an "employee representation committee or plan" is involved, evidence that the committee is in some way representing the employees.

In the instant case, the evidence shows that the Association has an already defined unit, that of staff psychiatrists at Bellevue Psychiatric Hospital, was formed in 1973 for the purpose of dealing with the Respondent regarding such matters as salaries, working hours and conditions, and grievances of its members, has elected officials (executive board) by elections held every 2 years, has dues paying membership, holds membership meetings, and has actually dealt with the Respondent, mainly through the director of psychiatry, Dr. Manual Trujillo, concerning issues such as wages (equalizing or improving the salary structure of the psychiatrists at Bellevue), the hours and working conditions of the psychiatrists, and grievances (Drs. Belsky, Kirshbaum, and Kermani). An employee organization with such goals and purposes—without—more—is a statutory organization. *Prime Time Shuttle International*, supra; *St. Anthony's Hospital*, supra. I therefore find and conclude that the Association is a labor organization within the meaning of Section 2(5) of the Act.¹

Moreover, at the time of the terminations, the following psychiatrists were members of the Association's executive board: Drs. John Graham, president; Ebrahim Kermani, vice president; Martin Geller, faculty representative; Jerome Steiner, treasurer; Stanley Portnow and Maeve Mahon, members at large; Kenneth Kirschbaum and William Weiss. There were approximately 45 psychiatrists in the Association, 28 of whom were assigned to in-patient wards.

¹ I am aware that in *New York University Medical Center*, 217 NLRB 522 (1975), the Board dismissed the Association's representation petition seeking to represent a unit of staff psychiatrists at Bellevue Psychiatric Hospital on the basis of the inappropriateness of the bargaining unit sought which is an entirely different issue than that presented here, whether or not the Association is a labor organization within the meaning of the Act. Subsequent to the Board's decision in this case, the Association continued to function, holding meetings, collecting membership, dues and dealing with the Respondent on employee issues. Of interest on the general issue of labor organization within the meaning of the Act, see *Aero Detroit, Inc.*, 321 NLRB 1101 (1996).

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges in substance, that the Respondent violated Section 8(a)(1) of the Act by threatening employees with cutbacks, layoffs, and other consequences if they continued to protest a change in employee work hours, and violated Section 8(a)(1) and (3) of the Act by discharging Drs. John Graham, Ebrahim Kermani, Martin Geller, Jerome Steiner, Stanley Portnow, and Meave Mahon because they engaged in protected concerted activities. The Respondent denies these allegations and additionally asserts, as affirmative defenses, that the alleged discriminatees are supervisors within the meaning of Section 2(11) of the Act and/or managerial employees because of their status as faculty members of New York University and therefore not subject to the coverage of the Act; and that since the Respondent's actions complained of here were dictated, directed or controlled by HHC, "a governmental agency" not subject to the coverage of the Act, the Respondent also was not subject to the coverage of the Act.

A. Background

Under an affiliated contract with HHC, the Respondent provides psychiatrists and other health care professionals to Bellevue Hospital Center for the purpose of delivering medical and psychiatrist patient care and services. All psychiatrists employed at Bellevue Hospital by the Respondent are also nontenured track faculty members of the Respondent's School of Medicine. HHC is a quasi public corporation responsible for operating the municipal hospital system of New York City, including Bellevue Hospital. Overall management of Bellevue Hospital is the responsibility of the executive director, Pamela S. Brier, and the medical director, Dr. David Cohen, who are employed by HHC.

Generally, patients admitted to Bellevue for psychiatric care are treated either through out-patient clinics or acute in-patient wards. Each in-patient ward is staffed by psychiatrists, including a unit chief, nurses, nurses aides or assistants, social workers, activity therapists, and clerical as well as maintenance personnel. Psychologists and other specialists, such as musical therapists are also available for in-patient care or consultation.

Bellevue's psychiatric services are managed and supervised on a daily basis by a team of administrators of the Respondent headed by Dr. Manual Trujillo, the director of psychiatry. Other administrators of the Respondent at Bellevue are Dr. Joel Wallack, deputy director of psychiatry, Dr. Ricardo Castaneda, director of in-patient psychiatric services, Dr. Hector Varas, associate medical director, and Dr. Robert Levy, senior clinical coordinator. Dr. David Scotch, is the associate dean at the Respondent's School of Medicine. Ivan Selzer is employed by the Respondent as the administrator for the hospital affiliation contracts.

Prior to the termination's of 10 psychiatrists by the Respondent on March 24, 1995, 42–50 psychiatrists were assigned to the 13–14 acute in-patient wards at Bellevue, which contains a total of approximately 369 in-patient beds.²

² Excluding the intake and emergency unit, a count of the persons listed on the in-patient wards of the psychiatric service schedule through March 1995 reveals 47 names. However, the undisputed evidence reveals that Goldfarb, McDowell, Sockfish, and Taylor are postgraduate fellows-in-training and that Hazzzi is a medical internist, not a psychiatrist.

Eight in-patient wards were devoted to general psychiatric treatment of adult patients while six in-patient wards were specialized units: 12 South was a medical-psychiatric unit; 19 West was a forensic unit; 20 North and 20 East were drug and alcohol units; 21 South was a child psychiatric unit; and 21 West was an adolescent unit.

The salaries of the psychiatrists employed by the Respondent at Bellevue range from \$50,000 to \$200,000. Generally, unit chiefs received an additional \$1500 in salary. Dr. Portnow testified that he was promised \$2500 additional but never received it.

B. The Evidence

For a number of years, HHC had expressed dissatisfaction with a practice under which certain psychiatrists employed by the Respondent at Bellevue Hospital worked from 9 a.m. to 3 p.m., HHC maintained that section 5.4.(b)(I) of the affiliation contract required physicians to provide at least 40 hours of service per week, inclusive of unpaid meal hours.³ By memorandum dated September 30, 1994, HHC Executive Director Pam Brier advised Dr. Trujillo that because of an extremely serious fiscal situation, "Effective November 1, 1994, all full-time staff must fulfill the obligation explicitly delineated in the affiliate contract to work at least 35 hours per week. As we've discussed, there really can be no exception to this policy regardless of any informal agreements."

The Meeting of September 30, 1994

On September 30, 1994, the Respondent conducted the first of several staff meetings to discuss the "9 to 3" issue.⁴ About 30-40 psychiatrists attended, including association executive board members Drs. Graham, Kermani, Mahon, Geller, and Portnow, among others. Dr. Trujillo announced that because of budget problems there would no longer be any "9 to 3" hours, that everybody had to increase productivity and work 9 a.m. to 4:30 p.m. or take a decrease in salary, as the only solution. Dr. Maeve Mahon testified that she suggested that clinical work be assigned to Drs. Wallack, Casteneda, Levy, and Varas, who were all administrators. Dr. Mahon related that it was chiefly the members of the executive board, particularly Drs. Graham and Kermani, who spoke out against the Respondent's announced changes in working

hours and that one of them stated that he thought that these hours were protected by the affiliation contract.

Dr. Mahon testified that Dr. Kermani suggested that everybody take a 10-percent cut in salary, including Dean Scotch and Dr. Trujillo and that the psychiatrists as "laborers should not be the ones who would be completely . . . victimized." Dr. Mahon related that Dean Scotch became very angry stating that, "Dr. Kermani was the whole problem, that if Kermani wasn't leading the opposition, or leading the riot, that there wouldn't be any problem." Dean Scotch testified that Kermani's remarks were very disturbing to him and that he took great exception to the term "laborers" as applied to doctors and resented the use of that term.

At the conclusion of the staff meeting on September 30, 1994, the Respondent distributed a memorandum from Dr. Trujillo to the "9 to 3" psychiatrists. In part, the memorandum stated:

I am enclosing a memorandum from Ms. Brier which requires all full-time staff throughout our hospital to work at least 35 hours a week. I hope to facilitate the orderly implementation of this directive while accommodating physicians preferences and commitments. In order to accomplish that goal, I would like each physician involved to notify me, by October 5, 1994 of his/her preference among the following options.

- (1) I prefer to continue my current 9-3 work schedule with a prorated salary reduction.
- (2) I prefer to receive another work assignment within the Department for the additional 7 1/2 hours a week (if available).

After consulting with the Association's attorney, who advised them of language they could use to submit the memorandum to the Respondent protesting such action the Association's executive board recommended to its members that they submit the memorandum under protest. According to the evidence here, this was actually done with psychiatrists submitting the memorandum under protest.

The Meeting in the Rose Room

A few days later the Respondent held another staff meeting in the Rose Room, Dr. Graham testified that Brier said that the longstanding "9 to 3" arrangement was no longer going to be tolerated and would have to be stopped immediately, that all psychiatrists would have to give their full 35 hours a week on premises and would no longer be allowed the on-call schedule of 10 percent of preparation time which she referred to as "informal arrangements" under the affiliation contract. Dr. Graham related that he responded to Brier stating that the "9 to 3" doctors were being discriminated against and that the Association was going to look into the matter to see what could be done about it.

Dr. Mahon testified that at this meeting she stated that she had been hired to work from 9 a.m. to 3 p.m. at a lesser salary, and asked how could the Respondent penalize this group for an hour they have already been penalized for? Dr. Portnow testified that Brier said that the "9 to 3" issue was

³ On investigating the matter, Dr. Trujillo stated that he had been told by his predecessors that the reduced work hours were originally offered to induce doctors to accept employment at Bellevue in return for lower salaries. Dr. Trujillo estimated that approximately 23 to 30 doctors worked from 9 a.m. to 3 p.m. Moreover, Dr. Trujillo testified that he sought to encourage his staff to present a plan to remove the "9 to 3" issue as a source of contention between HHC and the Respondent.

In part, sec. 5.2(f) of the affiliation agreement provides that physicians shall be entitled to participate in off-premises academic and/or clinical activities provided that no more than 10 percent of such time (40 hours inclusive of unpaid meal hours) is devoted thereto. Dr. Graham testified that the agreement allowed 10-percent off-premises time for research, teaching preparation, as well as on-call activities where 4 hours of on-call time was credited as an hour of on-premises time.

⁴ Ivan Selzer, the Respondent's administrator for affiliation contracts, testified that the purpose of the meeting was to see what employee response would be to the announced change in hours. Selzer stated that the staff "absolutely" refused to go along with the proposed changes, that this reaction was unanimous.

no longer negotiable, that it constituted "stealing" time and that they would have to agree to work until 4 p.m.—40 hours a week in the hospital. According to Dr. Mahon, after Brier mentioned something about "theft of services," Dr. Mahon raised her hand to catch Brier's attention but Brier refused to acknowledge her. After she continued to keep her hand up, Dr. Mahon recounted that Brier remarked, "You're trying to cause me trouble, aren't you?" Dr. Graham recalled that Dr. Mahon suggested that if the Respondent was looking to improve productivity it should cut into the bureaucratic team and put a couple of them to work seeing patients. Dr. Graham characterized the responses to Dr. Mahon's remarks as "quite strong" and "very nasty."

Dr. Mahon also testified that she attended another meeting in which Dr. Trujillo mentioned that the "9-3" psychiatrists were going to have to work more hours, and she asked why Drs. Wallack, Castaneda, Varas, and Levy couldn't "come downstairs from their offices and do some clinical care? That is a solution that has worked at Metropolitan Hospital and they haven't had to do any budget cuts as a result. What about having that one here?" According to Dr. Mahon, when Dr. Wallack started to react to this by saying something Dr. Trujillo silenced him stating, "[D]on't even respond to her, don't even answer her." Moreover, Dr. Mahon testified that she perceived animosity from Dr. Trujillo at every meeting she attended as an elected member of the Association. Dr. Trujillo appeared angry, difficult, and stated that the Association wasn't a union or labor group and represented no one.

Dr. Portnow's testimony which substantially supported that of Dr. Mahon as to what occurred at these meetings testified that after the Rose Room meeting had ended, and while he was waiting for an elevator, Dr. Trujillo told him that "Dr. Mahon's behavior was disgraceful, disloyal, undesirable and that it would lead to trouble for the attendings." Portnow also recalled that within the same day or the next Dr. Trujillo said to him that "the Association would be punished for its position on the '9 to 3' issue; that it was a political issue and that 'we should have taken the offer of renegotiating our time to eight-tenths time.'"⁵

Dr. Trujillo testified that he attempted to work out an acceptable solution by obtaining the permission of Brier and Dr. Scotch to accept the physicians hours, privileges, benefits, and salaries if they reclassified themselves as 80 percent physicians, full-time equivalent, with full pay and benefits. However, Trujillo stated that the "gurus" were not very responsive, and by the time—months later, they were ready to even consider it, the offer had been withdrawn.

The "Guru" group was a committee of senior psychiatrists who met with Dr. Trujillo to discuss hospital issues, more about which will be set forth hereinafter. Dr. Graham testified that after Dr. Trujillo had suggested at one of the "guru" meetings that regarding the "9-3" issue it would be wise if they drew up a proposal to show that the psychiatrists worked eight-tenths time at the hospital and give it to Brier and Dr. Scotch, the executive board consulted with their counsel and drafted a proposal which Dr. Graham personally delivered to Dr. Trujillo and which the Association felt

would meet that need. Dr. Graham related that Dr. Trujillo looked at it and returned it to him as being unsatisfactory.

The Kermani Incident

On Saturday morning, May 15, 1993, a patient of Dr. Kermani committed suicide. Dr. David Cohen, the medical director at Bellevue Hospital called Dr. Kermani at home and without identifying himself, directed Dr. Kermani to notify the patient's family. Dr. Kermani told him that one of the administrators should do this and hung up. Later after learning that he had spoken to Dr. Cohen rather than a doctor-in-training he apologized to Dr. Cohen. When she was notified of the incident, Pam Brier, executive director of Bellevue Hospital, wanted Dr. Kermani fired and called Dr. Trujillo who was on vacation in Spain to do so. According to Dr. Trujillo, he persuaded Dr. Brier to allow him to counsel Dr. Kermani instead, and to give him another chance, in effect saving his job.

On his return from Spain Dr. Trujillo held several "counseling" sessions with Dr. Kermani at which, according to Dr. Kermani's testimony, "Dr. Trujillo would speak most of the time bad-mouthing the Association and its president, Dr. Graham." Dr. Kermani recalled that Dr. Trujillo called one of the members of the Association a "son-of-a-bitch," accused Dr. Graham of writing idiotic letters, and stated that Dr. Graham and the Association "were nothing but a headache" for Dr. Trujillo, because they were making too many demands. Dr. Kermani also stated that Dr. Trujillo told him to "disassociate" himself from Dr. Graham and Dr. Kirschbaum who were the president and secretary of the Association, respectively.⁶

Subsequently, Dr. Kermani told Dr. Graham about Dr. Trujillo's remarks and an emergency meeting of the Association was held to discuss the situation. On June 3, 1993, Dr. Trujillo issued two counseling memoranda to Dr. Kermani, one regarding the counseling session held on May 26, 1993, regarding the incident following the suicide of his patient, the other for "disseminating information" from a counseling session to other psychiatrists at a meeting wherein Dr. Kermani created an "impression of mistreatment of you and other . . . physicians by the 'administration,' thus creating an atmosphere of fear and divisiveness among the medical staff." Dr. Kermani was placed on 6-months probation starting June 1, 1993.

On June 17, 1993, the Association filed an unfair labor practice charge in Case 2-CA-26624 regarding Dr. Kermani's discipline. The Regional Director issued a complaint and notice of hearing on October 28, 1993, and on May 17, 1994, an informal settlement agreement was entered into between the parties which provided among other things, the revocation of Dr. Kermani's probation.

Dr. Kermani testified that on or about June 1, 1994, he was called to Dr. Trujillo's office and given a letter acknowledging the revocation of his probation. Dr. Trujillo said that

⁵However, Dr. Trujillo testified instead that he advised the "guru's" that if they didn't deal with the "9-3" issue constructively, budgeting problems "will only get worse and affect everybody."

⁶Dr. Trujillo acknowledged that it was possible that he used the phrase "son-of-a-bitch" while advising Dr. Kermani not to listen to "these people." He also testified that he told Dr. Kermani that, "to link your name with John Graham, who has a lot of disciplinary problems, was not a good idea. Stick to your job, reflect on these issues . . . that's how unit chiefs here make it, by being—responding to the needs and the increasing requirements of leadership in the unit."

he always thought of Dr. Kermani as a good and conscientious doctor but warned him, "it is better to disassociate yourself from Kirschbaum and Graham." Dr. Kermani stated that when he refused, Dr. Trujillo became angry and said, "Then I will have to shoot them through you . . . Next time there will be no Association that you went to for cover." Dr. Trujillo recalled telling Dr. Kermani that "[t]hese people (referring to Graham and Kirschbaum) who have expressed the most personal animosity towards me, are shooting me through you." Dr. Trujillo also acknowledged telling Dr. Kermani that it was better to resolve "professional" issues on professional grounds and that he could not always be "running for cover."

Dr. Graham testified that after the Association filed the charge in Case 2-CA-26624, Dr. Trujillo declared he would no longer meet with the Association or deal with the executive board and did not do so. However, Dr. Trujillo denied that he refused to continue meeting with the Association, asserting that neither party had called for further meetings because the meetings were not contributing to solving the serious problems being faced by the Hospital, —the budget deficit and quality assurance issues. Further, Dr. Trujillo maintained that he had no authority to recognize the Association as the bargaining representative of the psychiatrists and that he did not do so.

The "Guru" Group

Dr. Portnow testified that in the summer of 1994, the acting director of child and adolescent services, Dr. Inamdar, suggested to Dr. Portnow that he could help reestablish lines of communication between Dr. Trujillo and the psychiatrists. After consulting with Dr. Graham, Dr. Portnow spoke to Dr. Trujillo who indicated the psychiatrists he wanted on the committee, excluding Drs. Kermani and Mahon. Eventually, the "guru" committee was comprised of Drs. Portnow, Inamdar, Geller, Graham, Weiss, and Kirschbaum, all being also members of the Association's executive board except for Dr. Inamdar.

The "guru" meetings took place on Thursday afternoons wherein discussions were had on issues concerning the functioning of the hospital, i.e., "9-3" working hours, the budget and the possibility of layoffs. Dr. Portnow related that at these meetings Dr. Trujillo usually ended up criticizing the Association for one thing or another including its attorney.

Dr. Trujillo testified that while the unfair labor practice charge was pending before the Board there was little contact between the Association and the Respondent. He stated that Dr. Portnow had raised the prospect of instituting a "so-called gurus" meeting, i.e., the senior people who have the capacity to understand the issues and give him good feedback about things. Dr. Trujillo related that he agreed to Dr. Portnow's suggestion as to the members of the committee, offering only that he wanted Dr. Inamdar to be included. Dr. Trujillo denied telling Dr. Portnow that there were doctors he did not want on the committee.

Other Alleged Statements of Animus

Dr. Geller testified that soon after Dr. Trujillo came to Bellevue Hospital Dr. Trujillo began talking to him about the Association and his distress that the doctors would set themselves up in an "adversarial" position with respect to the

management of the hospital and himself in particular. When Dr. Geller mentioned the Association regarding itself as somewhat of a union, Dr. Trujillo stated there could be no such thing as a union of physicians at the hospital "that such a thing should cease to be." Dr. Geller related that Dr. Trujillo often expressed his unhappiness with the Association and its officers in opposing his policies and aims and that Dr. Geller should sever himself from people like Drs. Graham, Kermani, and Mahon whom he regarded as detrimental to the psychiatric department. Dr. Geller added that in late 1994, Dr. Trujillo told him that he had a high esteem for Dr. Geller and Dr. Weiss but that if he had his way, he would be glad to get rid of people like Drs. Graham, Kermani, Kirschbaum, and Mahon.

Dr. Trujillo testified that he did not recall discussing the "notion of adversity" with Dr. Geller but admitted that he believed the Association was not contributing to the mission, goals, and objectives of the psychiatry department, and that he was "just declaring a fact."

Dr. Portnow testified that in October 1994, when Dr. Trujillo learned that Dr. Graham was seeking reelection as president of the Association's executive board, Dr. Trujillo became absolutely livid, stating, "You guys don't know what's in your best interest" that Dr. Graham was incompetent and that the Association was useless. According to Dr. Portnow, Dr. Trujillo sought to enlist his influence in defeating Dr. Graham in favor of Dr. Kirschbaum. On Graham's reelection, Dr. Trujillo accused Dr. Portnow of failing him in this task. In his testimony, Dr. Trujillo admitted much of what Dr. Portnow had stated about this but in milder language regarding Dr. Graham and the Association. Dr. Portnow also testified that on March 9, 1995, Dr. Trujillo stated to him that "the Association interfered with his ability to run the department and that the department would be better off without the Association."

The Discharges

The evidence shows that in the fall of 1994 HHC notified the Respondent that the mental health portion of the affiliation contract budget at Bellevue had to be reduced by approximately \$2 million. According to the testimony of several of the Respondent's witnesses they "tried to protect the psychiatrists working at Bellevue" by arguing against the reduction and offering an alternate proposal. After prolonged negotiations, however, HHC insisted on the budget cut and determined it could only be achieved by a reduction in the staff of 10 psychiatrists.

After the number of layoffs was determined, although it had fluctuated during the negotiations with a reduction from 12 to 10 psychiatrists at the very end of the process, Dr. Trujillo and his senior administrators implemented plans to reorganize the psychiatric department as developed in the fall of 1994 and early 1995. According to the testimony of the Respondents' witnesses they first determined that the reduction should be made in the in-patient rather than the out-patient units. They then decided that a unit would have to be closed and other medical units combined or reorganized. Because the new system would require the implementation of a treatment plan to rapidly stabilize and dispose of patients, the Respondent began to review the productivity and performance, especially the management and leadership skills of psychiatrists and of the unit chiefs, to determine which would be

most effective in the new structure and "enable the department to fulfill its mission with ten less psychiatrists."

According to Dr. Castaneda, he and Drs. Trujillo, Wallack, Levy, and other administrators participated in the decisions as to which psychiatrists would be laid off. The 10 psychiatrists selected, including the 6 alleged discriminatees here were notified on March 22, 1995, of their terminations. These included Drs. John Graham, Abraham Kermani, Martin Geller, Stanley Portnow, Maeve Mahon, Jerome Steiner, Richard King, Henry Wernstein, Michael Gray, and Andrew Chau. On the foregoing date, the alleged discriminatees testified that they were summoned to the 22nd floor and given a form letter signed by Selzer notifying them, in part, that reductions would have to be implemented and that "[d]ue to the necessity to take action as soon as possible your last day of employment will be March 24, 1995." Each of the alleged discriminatees were told that he or she was being terminated due to budgetary reasons rather than their job performances.

Dr. Trujillo stated that he told Dr. Kirschbaum that he and Dr. Weiss were other persons on the list for layoff and that he may have told Dr. Kirschbaum that he had interceded with Brier at the last minute to save his job. While Dr. Trujillo denied making similar remarks to Dr. Weiss, he recalled that he may have told Dr. Weiss, as well as the "gurus," that "it was not a good idea, in a budgetary shortness to have an open issue like the 9:00 to 3:00. It makes you very visible for the chopping block."

Dr. Portnow testified that on March 24, 1995, while on the 22nd floor saying goodbye to a secretary, he encountered Dr. Varas who told him he had nothing to do with Dr. Portnow's termination. Dr. Trujillo also denied responsibility for the termination since it was a matter between Brier, Dean Farber, and Dean Scotch. Dr. Portnow stated that Dr. Trujillo mentioned that he and Dr. Wallack had been interviewing doctors for a very long time and that they had many good candidates from Columbia.

Dr. Portnow also testified that during March 1995, after his termination, he had occasion to return to Bellevue Hospital wherein he encountered Dr. Varas, Brier, Deans Farber and Scotch, and Dr. Trujillo, all of whom either denied making the decision regarding whom to terminate or indicated that the decision had been made between Dr. Trujillo and the department of Psychiatry, or Dr. Trujillo and Brier. Dr. Portnow added that Dean Farber had stated that he was "horrified" the way the most senior people had been treated, and the fact that seniority had not been considered in the layoffs. Dr. Portnow related that on March 30, 1995, he returned again to Bellevue and in a conversation with Dr. Trujillo was told, "You guys are never going to work for Bellevue again. You're history." Dr. Trujillo denied saying this.

After the terminations, in a memorandum dated March 27, 1995, issued by Selzer, the Respondent announced the end of the "9 to 3" work schedule. As of April 3, 1995, all physicians who presently worked 9 a.m. to 3 p.m. would be required to provide services between the hours of 9 a.m. to 4 p.m. on-premises. The individual doctors had these options: (1) except the 9 a.m. to 4:30 p.m. hours; (2) accept employment with HHC at Bellevue; and (3) or resign.

The Implemented Reorganization Plan as it Affects the Terminations

In his memorandum to HHC entitled "Future of Bellevue Department of Psychiatry" and dated January 30, 1995, Dr. Trujillo stated that there was close to 100 percent occupancy on the in-patient wards and that the department of psychiatry generated a "modest but growing profit"⁷ Nonetheless, at the Respondent's level of funding as of January 27, 1995, Dr. Trujillo stated that "senior management" sanctioned, among other things: (1) the closing of a 27-bed adult unit, for a net redistribution of 25 nursing, 2 physician, and 5 other clinical lines, and (2) a reduction of the census (beds) of the forensic unit to 15, a net "savings" of 10 nursing, 2 physicians and 2 other clinical lines. Dr. Trujillo explained that the Respondent sought to close a larger unit so as to maximize the redistribution potential of the professionals assigned to the unit, particularly the nurses. In regard to the forensic unit, Dr. Trujillo admitted that the Respondent "might have been thinking about" reducing the patient capacity of the unit so as to eliminate two psychiatric positions, among others.

With respect to the reorganization plan eventually implemented by the Respondent, Dr. Castaneda testified that he wrote the memorandum dated April 10, 1995, entitled "Inpatient Psychiatry Departmental Restructuring," in order to describe and define the new "mission" of each of the remaining units. The relevant changes, if any, made to the staffing and function of the in-patient units are discussed below.

12 SOUTH

The plan identifies 12 South as a general unit which "will continue to function as previously." The Respondent terminated Drs. Kermani and Steiner and replaced them with Dr. Buckingham and, on a part-time basis, Dr. Sageman. Drs. Buckingham and Sageman were transferred from the outpatient walk-in clinic and consultation-liaison units, respectively. The Respondent did not terminate or otherwise remove Drs. Brodie, Ravelo, or Hazzi from the unit.⁸

At the time he was terminated, Dr. Kermani had been employed by Bellevue for approximately 25 years, was a full clinical professor at NYU's School of Medicine, and had earned certification by the American Boards of Psychiatry and Neurology, Child Psychiatry, and Forensic Psychiatry. In addition, Dr. Kermani had authored approximately 25 academic articles, including articles on AIDS, as well as a book on forensic psychiatry.⁹ For the past 15 years of his employment by the Respondent, Dr. Kermani served as the unit chief of Bellevue's medical-psychiatric unit.¹⁰

⁷ However, Dr. Trujillo also testified that this statement was not accurate "if you apply all accounting rules."

⁸ Dr. Kermani stated that Dr. Hazzi was a medical internist, not a psychiatrist. It should also be noted that Drs. Varas, Steiner, and Ravelo were hired by the Respondent subsequent to 1990.

⁹ Dr. Wallack acknowledged that he has cited Dr. Kermani in articles he has written on AIDS and that Dr. Kermani has expertise in ethical and legal issues dealing with AIDS.

¹⁰ Dr. Wallack stated that there were not many medical-psychiatric units throughout the country and that there were only two in New York City.

Dr. Wallack testified that the administrators felt the internists were providing the primary "leadership" in the unit and that they needed someone who could better coordinate and/or integrate the medical and psychiatric care of the patients on the unit. Dr. Wallack stated that he did not put such concerns in writing but that he had spoken to Dr. Kermani about his "goals" for the unit. Dr. Wallack stated that Dr. Castaneda recommended Dr. Buckingham to replace Dr. Kermani as unit chief, and that Dr. Buckingham had demonstrated expertise in treating medical as well as psychiatric patients, and was board-certified in family medicine. Dr. Wallack further noted that Dr. Sagemen had run the consultation-liaison unit at Bellevue for 16 years and that Dr. Ravelo was bilingual and had fellowship training in geriatric psychiatry.

With respect to Dr. Kermani's termination, Dr. Castaneda testified that the most important factor for him was that Dr. Kermani had difficulty implementing policies intended to upgrade the unit. However, while Dr. Castaneda admitted that Dr. Kermani was a competent scholar he maintained that Dr. Kermani had difficulty "mobilizing" the team and providing an efficient treatment program on the unit.

Dr. Trujillo stated that he recalled that Dr. Castaneda and the other administrators said that Dr. Kermani did not have the updated clinical skills to run a hyper-acute unit, that he lacked the "leadership" skills to motivate the staff on the unit, and that he did not have the capacity to ensure that the documentation and quality assurance programs would be implemented.¹¹

In regard to Dr. Steiner, Dr. Wallack stated that he had been a problem when he had worked in the consultation-liaison unit and that they had been asked by the directors to get him out of that unit. Dr. Wallack stated that Dr. Steiner had similar problems on 12 South and that he was not proficient in treating patients with heart disease or a need for complicated psychopharmacology. Dr. Castaneda testified that Dr. Steiner was a competent group therapist and had "spontaneous enthusiasm" to initiate group programs. However, Dr. Castaneda described Dr. Steiner's clinical judgment as "sub-optimal," and stated that he regarded him as "functioning below average." Dr. Trujillo stated that he had reviewed 25 records while Dr. Steiner was in the consultation-liaison unit and concluded that Dr. Steiner needed reassignment because his clinical skills were not up to caring for patients who were very ill or had serious disorders.

19 NORTH

Like 12 South, the plan lists 19 North as a general unit which will continue its previous function. Dr. Geller stated the traditional function of the unit was to teach residents and medical students.¹² The Respondent terminated Dr. Geller, promoted Dr. Halamandaris to acting unit chief, and transferred Dr. Sussman to the unit from the out-patient clinic

listed as the "Biological Psychiatry-Psychopharmacology Service" on the psychiatric service schedules.

Dr. Geller had been employed by the Respondent at Bellevue for approximately 27 years before he was terminated. He had served as a unit chief since 1974 and was an associate clinical professor at the Respondent's School of Medicine. Dr. Wallack stated that Dr. Geller was loyal, devoted, hard-working, and one of Respondent's most popular psychiatrists. However, Dr. Wallack maintained that residents and staff complained about Dr. Geller's performance and that the senior leadership had become concerned over his quality of teaching and supervision of residents. Dr. Wallack testified that they tried to give Dr. Geller "remedial direction" and had asked him to make changes in the quality of his teaching. Although he described the decision to terminate Dr. Geller as a difficult one, Dr. Wallack stated that the Respondent would have probably made a change in the "leadership" of the unit regardless of the layoffs. Dr. Wallack admitted, however, that he probably had more feedback from around the nation about Dr. Geller's termination than anyone else.

As a result of complaints from the residents and the Director of the residency-in-training, Dr. Carol Bernstein, Dr. Castaneda testified that a meeting with the residents was held on September 20, 1994, without Dr. Geller to address the complaints.¹³ In response to the criticisms, Dr. Geller wrote a memorandum to Dr. Castaneda and Dr. Bernstein detailing proposed changes to the manner in which the unit was run. Dr. Castaneda testified, however, that Dr. Geller was not successful in implementing many of his proposals and faulted Dr. Geller for his alleged inability to "rein in" Dr. Ambrose or to provide adequate treatment planning. Dr. Castaneda also stated Dr. Geller's command of psychopharmacology was poor and cited an instance in which Dr. Geller allegedly admitted he did not know valium was classified as a benzodiazepine.¹⁴ Dr. Castaneda did say, however, that Dr. Geller was extremely devoted and worked harder than most physicians.

The Respondent introduced into evidence Dr. Castaneda's written performance evaluation of Dr. Geller in 1993 and a clinical evaluation of unit 19 North by Dr. Varas in 1994. Dr. Castaneda rated Dr. Geller "good" or "outstanding" in 9 of 11 categories, including "outstanding" ratings in diagnostic/assessment skills and teaching skills.

21 NORTH

The plan categorizes 21 North as an "acute" unit which receives patients from other units, continues the process of stabilization, and completes the appropriate documentation for patient disposition to state-or community-bound facilities. The Respondent terminated, Drs. Portnow and Gray, and replaced them with Drs. Weiss and Sadka who were trans-

¹¹ On his performance evaluation dated March 16, 1993, Dr. Castaneda rated Dr. Kermani "satisfactory" in the so-called unit chief skill areas. These types of evaluations were the subject of numerous complaints by the Association to the Respondent.

¹² Dr. Castaneda stated that the Respondent's psychiatric residency program, a premier program nationally, rotates all its psychiatric residents through 19 North.

¹³ R. Exh. 33 consists of two sets of different notes allegedly taken by Bernstein who did not testify. The notes consists of a laundry list of complaints, some of which attribute views to Dr. Geller and Dr. Ambrose who also did not attend the meetings.

¹⁴ On redirect examination, Dr. Geller testified that the drug he did not realize was a benzodiazepine was Librium, not Valium, that he had not prescribed Librium in 15-20 years, and that no one had ever questioned his prescription, or lack thereof, of either Librium or Valium.

ferred from 20 South and the emergency room, respectively.¹⁵

Dr. Portnow has practiced psychiatry since 1961 and had been employed by the Respondent at Bellevue for 26 years before he was terminated. Dr. Portnow served as unit chief at Bellevue for 21 years, including a 3-year stint as unit chief of the forensic unit. Dr. Portnow was also a full clinical professor at the Respondent's School of Medicine, and had written or coauthored 10 academic articles and delivered 95 lectures on various topics in the field of psychiatry. He is certified by the American Boards of Psychiatry and Neurology as well as Forensic Psychiatry and has expertise in psychoanalysis, psychopharmacology, brief psychotherapy, and hypnosis.¹⁶ In the May 20, 1996 edition of *New York* magazine, Dr. Portnow was named one of: The Best Doctors in New York.¹⁷

Dr. Wallack stated that 21 North had a long history of patients with excessively long lengths of stay and that Dr. Portnow was felt to be a weak manager. Dr. Wallack further stated that 21 North was being converted to a community-bound unit, one of the most difficult tasks, and that Dr. Weiss had a demonstrated ability to get people through treatment and into the community faster than the other unit chiefs.¹⁸ Dr. Wallack maintained that Dr. Weiss was "far and above" more capable of running a community-bound unit than anyone else.

Although he admitted Dr. Portnow has plenty of expertise and experience, Dr. Castaneda maintained that his lack of "leadership" was "overwhelming." Dr. Castaneda stated that Dr. Portnow had "failed" at implementing therapeutic programs and that there had been complaints concerning the manner in which the unit had been run. During his evaluation of the unit, Dr. Castaneda testified that Dr. Portnow frequently was not present, that the unit lacked structure, that the staff was not instructed on how to treat patients and its participation was erratic, and that patients lacked a clear disposition.¹⁹

¹⁵ The emergency room is commonly referred to as CPEP-Comprehensive Psychiatrist Emergency Services-and is listed as "intake and emergency service" on the psychiatric service schedules.

¹⁶ At the time he was terminated, Dr. Portnow stated that he was the only psychiatrist at Bellevue who used hypnosis in his clinical practice.

¹⁷ See pp. 80-94. Other psychiatrists listed on the psychiatric service schedules who were also named in the article are: Magda Campbell, Robert Cancro, Jeffrey Foster, Marc Galanter, Richard Oberfield, Elizabeth Spencer, Norman Sussman, and Henry Weinstein.

¹⁸ Drs. Castaneda and Varas testified that the Respondent tracks length-of-stay (LOS) statistics on a daily basis and that such statistics are a daily source of concern and discussion. In reviewing the LOS statistics for the last 3 years preceding the terminations and that Drs. Portnow, King, Steiner, Weiss, Leingang, Halamandaris, Kermani, Guss, Perry, Geller, and Pumerantz all had high LOS numbers. Although Dr. Castaneda stated that many of the doctor's statistics could not be fairly compared because of the different patient populations involved or because of additional responsibilities such as residency training, he pointed out that Weiss had the longest LOS statistics for the general adults wards, and that 18 South, which was manned by Drs. Graham and Chan, had low LOS numbers. The Respondent did not adduce any documents containing LOS statistics to substantiate Dr. Castaneda's testimony.

¹⁹ The Respondent introduced into evidence Dr. Castaneda's written evaluation of unit 21 North which contained a number of criti-

18 SOUTH

The plan states that 18 South has become an "intensive treatment" unit with a target LOS of 14 days. The plan also provides: "Medical staff will be expected to complete a thorough medical and psychiatric assessment, initiate prompt psychotherapy and other therapeutic modalities as directed, and make a prompt determination regarding likely disposition." The Respondent terminated Drs. Graham and Chau and reassigned Drs. Kirschbaum, Harnes, Stockfish, and Welner to this unit.²⁰ Dr. Castaneda testified that Drs. Stockfish and Weiner were temporarily loaned to 18 South to assist with its increased workload.

Prior to his termination, Dr. Graham had been employed by the Respondent at Bellevue for 27 years, 19 of which he served as a unit chief. At the time of his termination, Dr. Graham was an associate clinical professor at NYU's School of Medicine and was certified by the American Board of Psychiatry and Neurology.

Dr. Wallack testified that Dr. Graham was a problem in terms of psychiatric, managerial, and interpersonal abilities. Dr. Wallack stated that there were concerns that Dr. Graham had precipitously discharged patients, inappropriately referred patients to the emergency room, failed to complete discharge summaries leading to rejection of patients, and had allowed the legal status of patients on the ward to lapse.

Dr. Wallack related that the Respondent received numerous written complaints about Dr. Graham and while they tried to work with him, he responded in ongoing "defiance and oppositional behavior." Dr. Wallack explained that Dr. Graham failed to cooperate with their attempts to improve his clinical care, length of stay, work with other disciplines or to provide quality assessment, and management programs. As a result Dr. Wallack stated that Dr. Castaneda held repeated counseling sessions with Dr. Graham, culminating in a meeting on the day before Christmas during which Dr. Wallack discussed Dr. Graham's behavior, attitude, and lack of leadership concerning the treatment and discharge planning of his patients. After the meeting, Dr. Wallack stated that he wrote a memorandum to Dr. Graham and that he "would have" caused it to be distributed to him. However, Dr. Graham testified that he never saw nor received such a memorandum. While Dr. Wallack admitted that he did not believe that Dr. Graham would be able to make the "changes" needed on the unit, he did not recall sending further written warnings to Dr. Graham.

The testimony of Dr. Castaneda regarding Dr. Graham was similar to Dr. Wallack's. Dr. Castaneda testified that Dr. Graham had severely impaired leadership skills and difficulty assimilating new information. Dr. Castaneda stated that Dr. Graham was unable to consider his shortcomings, and that he

cisms. In a memorandum addressed to Dr. Wallack and dated August 15, 1994, Dr. Portnow responded to the evaluation and pointed out the unfair and prejudicial manner in which it was conducted. Among other things, Dr. Portnow noted that the evaluation was conducted without notice and at a time when Dr. Gray was on vacation.

²⁰ The Respondent asserts that Dr. Graham was replaced as unit chief by Dr. Kirschbaum, a former president and current officer of the Association, as indicative that this decision was not influenced by association activity. However, the existence of unlawful motivation is not inherently negated by a showing that only some of a greater number of union activists are terminated or laid off on a particular occasion. *Schaeff, Inc.*, 321 NLRB 202 (1996).

was given to “grandstanding . . . speaking to some audience instead of ever engaging a discussion of the issues.” Dr. Castaneda alleged that 18 South functioned poorly, had the most complaints from other agencies, and that Dr. Graham’s interactions with the directors of other disciplines was extremely negative.

The Respondent introduced into evidence approximately a dozen memorandum purporting to address performance—related problems of Dr. Graham. All but two of the memoranda were dated between June 16, and December 27, 1993, and concerned alleged deficiencies of Dr. Graham with respect to the completion of medical records and charts, inadequate participation in LOS, peer review and clinical discussions, nonattendance, and inappropriate discharges and referrals to admission. In the memorandum dated December 27, 1993, and addressed to Dr. Graham, Dr. Wallack expressed concern over Dr. Graham’s “consistently oppositional stance” stating that he was “invariably challenging and argumentative—choosing diatribe over cooperation.” After enumerating Dr. Graham’s alleged deficiencies, Dr. Wallack directed Dr. Graham to “immediately take steps to correct [the] deficiencies.”²¹

Prior to 1993, Dr. Graham recalled receiving one disciplinary memorandum and that involved one incident regarding his absence from Bellevue. Dr. Graham testified that he did not see the memoranda dated June 16, July 13, and August 6, until he met with Dr. Castaneda on September 22. In the memoranda dated October 4 and 5, 1993, and addressed to Drs. Trujillo and Castaneda, respectively, Dr. Graham indicated that he thought he was being harassed by the Respondent because of his position with the Association and his involvement with the pending National Labor Relations Board (NLRB) charge filed by the Association on Dr. Kermani’s behalf. In a memorandum dated October 20, Dr. Graham further stated, “This is the first time I learned that you had long-standing difficulties in getting me to implement virtually all administrative initiatives. Your criticisms in no way lead me to believe that a campaign of harassment in my case is not under way.” Dr. Graham explained that his personnel

file was essentially empty until June 1993, about the time when the NLRB charge was filed.²² Dr. Graham stated that he never received Dr. Wallack’s memorandum dated December 27 containing the numerous criticisms of his performance. After he met with Drs. Wallack, Castaneda, and Varas on December 23, Dr. Graham sent Dr. Wallack a memorandum requesting documentation of the criticisms made against him, but never received a response to his request.

On December 29, 1993, during a meeting with Drs. Trujillo and Varas, Dr. Graham stated that Dr. Trujillo told him that he just had to “amend a few things,” that no one was looking for his job.

20 SOUTH

The Respondent closed this unit, terminated Dr. Mahon, and reassigned Dr. Weiss to 21 North.

Dr. Mahon has been practicing psychiatry since 1978 and was employed by the Respondent at Bellevue for 8 years. At the time of her termination, she was an assistant clinical professor at the Respondent’s School of Medicine. She is board-certified in psychiatry and neurology.

Dr. Wallack testified that when the Respondent looked at the reductions in nursing, social work, and the psychiatrists, they “obviously” tried to preserve as many beds as possible and decided to close 20 South, a relatively small 19-bed unit. Dr. Wallack said that Dr. Mahon had generated concerns by the other disciplines in terms of her attitude and performance and that there had been difficulties in getting her to cooperate with “changes in the systems.” Dr. Wallack stated that although the Respondent considered Dr. Mahon an adequate performer, it had better people to choose for retention.

Dr. Castaneda stated that Dr. Weiss and persons from other disciplines complained that Dr. Mahon was difficult to work with, that she would not listen to other people, and that she was not a “team player.” Although intelligent and knowledgeable, Dr. Castaneda stated Dr. Mahon was not even regarded as an average attending psychiatrist.²³ However, the Respondent introduced into evidence Dr. Mahon’s 1993 performance evaluation. She was judged to be “good” or “outstanding” in six of eight categories including the area entitled “Working Relationships with Staff.”

In sum, Dr. Castaneda testified that all the psychiatrists who were terminated were less competent than their colleagues relative to the duties required by the reorganization of the department. Dr. Castaneda explained that their “level of competence relative to the newly assigned duties, responsibilities for each position, was below the availability of talent and skill and experience in the department.”²⁴

The Respondent acknowledges that after the alleged discriminatees were terminated, a number of psychiatrists employed by the Respondent at Bellevue have left the hos-

²¹ The Respondent also introduced a three-page performance evaluation of Dr. Graham by Dr. Castaneda which was dated March 16, 1993, on p. 1. However on p. 1, in the “organizational and leadership skills” category, there is a faint checkmark in the “good” section and a darker checkmark in the “satisfactory” section. On p. 2 of the evaluation, there are written comments by Dr. Castaneda and the page is signed solely by him.

The General Counsel also introduced a copy of Dr. Graham’s evaluation into evidence. The General Counsel’s copy showed a clear checkmark in the corresponding “good” section and what appears to be a checkmark that was scribbled over in the “satisfactory” section. In addition, the General Counsel’s copy contained no handwriting at all on the second page. Dr. Graham further stated that Dr. Castaneda said he deserved a better mark and scratched out the checkmark in the “satisfactory” section and placed a checkmark in the “good” section.

The second page of the evaluations of Drs. Geller, Portnow, and Kermani all contain Dr. Castaneda’s written comments and only his signature. Drs. Geller and Portnow both testified that they did not recall seeing the second page of their evaluations.

With respect to Dr. Kermani’s evaluation Dr. Castaneda stated that he filled the second page a couple of days after he initially showed the evaluation to Dr. Kermani but did not recall whether he later showed him the page with his handwritten comments on it.

²² The record shows that the suicide of Kermani’s patient occurred on or about May 15, 1993, and that Case 2–CA–26624 was filed by the Association on June 17, 1993. (G.C. Exh. 5, R. Exh. 65.)

²³ While Dr. Trujillo stated that he had little contact with Dr. Mahon he said he was not surprised by Dr. Castaneda’s comments about her. Dr. Varas stated that, Dr. Mahon was not “appropriately knowledgeable” about the peer review process.

²⁴ However, according to the testimony of Dr. Varas, Drs. Gruns, Currier, Ravelo, Rubin, Welner, Bardey, Gosselin, Guss, Munoz-Silva, Jordan, and Halamandaris were all hired after them and therefore had 5 or less years of experience at Bellevue.

pital and that the Respondent has not offered to rehire any of the alleged discriminatees.²⁵

Indeed, Dr. Kermani testified that he found advertisements for psychiatrists positions at Bellevue in the New York Times on July 30, and December 3, 1995. The advertisement placed on July 30 lists three available positions (1) chief of adolescent psychiatry in-patient services; (2) child and adolescent psychiatrist, and (3) adult psychiatrist for new out-patient service. The advertisement placed on December 3 lists the following "attending psychiatrist" positions as available: (1) adult consultation and liaison; (2) pediatric consultation and liaison, (3) forensic mental health acute care, (4) new and innovative day treatment program, (5) adult out-patient mental health division; and (6) comprehensive psychiatric emergency service.²⁶

The Job Duties and Responsibilities of Unit Chiefs

Four of the alleged discriminatees, Drs. Kermani, Graham, Geller, and Portnow held the title of in-patient unit chiefs for which Drs. Kermani, Graham and Geller received a salary supplement of \$1500 for performing these duties. Dr. Portnow testified that he had been promised \$2500 but never received it. As regards the duties and responsibilities of unit chief the General Counsel's witnesses testified as follows.

Dr. Kermani denied unequivocally that he had the authority to hire, transfer, suspend, lay off, recall, discharge, discipline, or promote employees or to adjust their grievances. However, he stated that on numerous occasions Dr. Castaneda had "directed him to tell certain doctors to improve aspects of their performance." On one occasion, Dr. Kermani related that Dr. Castaneda called him into his office and ordered him to take notes as Dr. Castaneda "counseled" the doctor and pursuant to Dr. Castaneda's direction, Dr. Kermani issued the counseling memorandum under his signature to the doctor.

On reporting to his ward, Dr. Kermani stated that he would review the admissions book listing the patients admitted overnight and the doctor to whom the patient had been assigned. After examining his new patients and writing notes on their medical charts, Dr. Kermani would make rounds to visit and reexamine his old patients. Depending on the particular day, Dr. Kermani related that he would then attend either a team meeting, a staff meeting, a "supervisory" meeting, and/or a unit chief meeting.

Dr. Kermani testified that "team" meetings were held once a week, were attended by a social worker, an activity therapist, a psychologist, etc., and concerned solely his patients.²⁷ Dr. Kermani stated that the purpose of the meetings was to plan a comprehensive approach to his patient's needs and their disposition. In regard to the so-called "supervisory" meetings, Dr. Kermani stated that such meetings were held each week with Dr. Castaneda on an individual as well as a group (doctors only) basis. Dr. Kermani further

stated that Dr. Varas visited 12 South once a week and that Drs. Wallack and Trujillo also visited the ward occasionally. Dr. Kermani indicated that each month the unit chiefs met with Dr. Trujillo, Castaneda, Wallack, Weiss, and Levy who would instruct them about hospital policies and procedures.

Dr. Geller testified that usually changes in policies such as medications or quality assurance policies were discussed in unit chief meetings as well as upcoming reviews or inspections. Dr. Geller noted that speakers from nursing, social service, etc., would appear and discuss various issues or problems. Dr. Geller stated that the unit chiefs were expected to convey such information to their colleagues so they understood the new policies but that the unit chiefs did not have the authority to make sure such policies were followed by others.

Dr. Kermani testified that he did not have responsibility for any aspect of another doctor's ethical obligation to report any conduct which might harm a patient. With respect to the other ward personnel such as nurses and social workers, Dr. Kermani stated that each discipline bore different responsibilities toward patients and had its own set of supervisors on the ward.

Dr. Geller related that he and the other attending psychiatrist worked independently but that he would speak to the other doctor "as a colleague" if he disagreed with his treatment of a patient. If disputes arose with or among the other disciplines, Dr. Geller stated that he would try to mediate a solution and if unsuccessful, would report the matter to the supervisors of the respective disciplines or to Dr. Castaneda.

Dr. Graham testified that he had a "moral" task as a unit chief to have a collegial atmosphere, to have people working together well, and to see that the patients were content. Dr. Graham stated that each psychiatrist made individual determinations with respect to the treatment of their own patients and that problems which arose with other ward personnel were referred to the supervisors of the respective discipline if the matter could not otherwise be resolved. Dr. Graham denied having the authority to discipline employees.

Dr. Portnow testified that he and the other doctor on the ward, Dr. Michael Gray, practiced separately and that he never "interfered" with Dr. Gray unless Dr. Castaneda brought something to his attention. For example, Dr. Portnow stated that he was asked to figure out a way to improve Dr. Gray's handwriting. In another instance, Dr. Portnow stated that he, Dr. Halamandaris and Dr. Gray sat down together and "brainstormed" over possible ways to lower the latter's LOS statistics.

Concerning patient assignments, on 12 South Dr. Kermani stated that a nurse or clerk would initially assign patients to each doctor based on a predetermined order agreed to by him, Dr. Steiner and Dr. Ravelo that reflected the proportion of hours they worked at the hospital. Dr. Kermani stated that this resulted in a few less patients being assigned to him since he worked only until 3 p.m. as opposed to Drs. Steiner and Ravelo who worked until 4:30 p.m. Dr. Kermani further stated that they sometimes assumed the care of patients according to their professional interests or abilities by "gentlemen's agreement" and that he did not have authority to unilaterally decide the manner in which patients were to be assigned.

In much the same manner, Dr. Portnow testified that the adult patients on 21 North were assigned by the nursing staff

²⁵ Dr. Wallack testified that Drs. Welner, Rubin, Pommerantz, Hames, and Mitchell are no longer employed at Bellevue.

²⁶ Although Bellevue Hospital Center (HHC) appears on both advertisements, applicants are directed to send their resumes to "Dr. Joel Wallack, Deputy Director, Department of Psychiatry." (G.C. Exh. 11.)

²⁷ Dr. Kermani testified that each doctor was responsible for his own patients, met with his team separately, and that there were supervisors from the other disciplines present at the team meetings.

and that he and Dr. Gray were assigned an equal number of patients. Dr. Portnow expressly denied that he had the authority to modify the patient assignments. Dr. Portnow related that at one time, he denied a doctor's request to switch patients because she did not want to treat patients with a particular type of personality disorder. Moreover, at Dr. Trujillo's suggestion, Dr. Portnow stated that he spoke to a psychiatric resident, Dr. Peter Goetz, about the possibility of being assigned as a resident to 21 North but that he did not guarantee him postresidency employment because he did not have such authority.

Dr. Graham testified that the case assignments on 18 South were routine, that patients were assigned according to a set quota. Dr. Graham stated that he did, however, decide to have Chinese-speaking patients assigned to Dr. Chan because he spoke Chinese and that he could have chosen to have more input in patient assignments.

Although not a unit chief, Dr. Mahon testified that she and Dr. Weiss discussed the manner in which patients were to be assigned on 20 South and decided that they would let the head nurse make such assignments on an equal basis between them.

With respect to the hiring and transfer of employees, Dr. Kermani stated that he did not interview any of the doctors that were assigned to his ward before they were hired. He recalled that Dr. Castaneda merely introduced Dr. Ravelo to him shortly before she began working on 12 South and that he was initially told by Dr. Steiner himself that he was being transferred to the ward.

Dr. Portnow stated that he met all the doctors who worked on his ward after they had been hired, with the possible exception of Dr. Gray who Dr. Portnow was unsure about.

After he began working on 19 North, Dr. Geller testified that only one additional doctor, Dr. Halamandaris, was assigned to the ward. Dr. Geller stated that he was informed by Dr. Trujillo or Dr. Castaneda that a favorable opportunity has arisen, that Dr. Halamandaris and his young adult program might be coming to 18 North. Dr. Geller said he happily responded that that was nice but that he never thought he had the power to say no.

Dr. Graham testified that he and Dr. Sunnen spoke to Dr. Chan for 15–20 minutes after he had been interviewed by the assistant director. Thereafter, Dr. Graham stated that he called upstairs and said that Dr. Chan seemed fine. Dr. Graham stated that his meeting with Dr. Chan was a matter of courtesy and denied that he had hired Dr. Chan, noting that he did not review any documentation or take part in discussions of Dr. Chan's salary.

The record shows that in or about March 1993, the Respondent directed Drs. Kermani, Graham, Portnow, and Geller to submit evaluations of the psychiatrists on their respective wards. However, no evidence was adduced to show whether the evaluations had any effect on the job status, salaries, or other working conditions of the psychiatrists.

The General Counsel asserts that according to the testimony of its witnesses the integrity of the evaluation process is highly questionable. Dr. Kermani testified that Dr. Castaneda directed him to give the psychiatrists low grades while Dr. Graham stated that Drs. Castaneda and Wallack told him to grade others in the satisfactory range. Dr. Portnow stated that he prepared an evaluation for Dr. Gray

which Dr. Castaneda discarded and made his own "phantom" evaluation of Dr. Gray.

In order to schedule time off, Dr. Kermani testified that the doctor making such a request had to assure Terri Lockett in the personnel department that the ward was covered, meaning at least two physicians would be on duty during the doctor's absence. Once Lockett approved the request, Dr. Kermani stated that the senior doctor, i.e., the unit chief had to sign the request which would then be submitted to Dr. Trujillo who could refuse the request, which Dr. Kermani stated occurred on many occasions. As a matter of courtesy, Dr. Kermani stated that he and his colleagues would notify each other when they were going to be absent or late. With regard to public holidays, Dr. Kermani stated that Dr. Trujillo's office was solely responsible for arranging coverage for the units and that a list of "moonlighters" was maintained for that purpose.

Dr. Graham agreed that unit chiefs were responsible for ensuring appropriate and adequate coverage on their units. Dr. Graham explained that the doctors on his ward coordinated their vacation schedules amongst themselves, though he said that this was his choice. Dr. Graham stated that coverage for public holidays was handled by the administration and that he and the other doctors were available on-call if needed.

Drs. Geller and Portnow testified that they and the other doctors on their wards would work out their vacation schedules among themselves to ensure that they did not request time off at the same time but that they still had to sign the leave requests and then submit them to Dr. Castaneda or Dr. Wallack for approval.

However, the testimony of the Respondent's witnesses is in significant respects contrary and inconsistent with that of the General Counsel's witnesses.

Dr. Castaneda, the director of inpatient services since 1992, testified that he is responsible for about 360 beds. There are 13 psychiatric units, each with an average of 25 beds. The number of doctors in each unit varies from two to six or more. There is a total of about 50 doctors. In addition, there are nurses, social workers, therapists, clerks, maintenance workers, and cleaners working in each unit. With regard to the 50 doctors, Dr. Castaneda stated that he has only the unit chiefs to help him supervise them. While the other workers have a separate line of supervision, the unit chief is responsible for overseeing and supervising the work of all those workers to make sure the unit is functioning properly. In other words, the unit chief is responsible for the unit.

Dr. Castaneda testified that he was a unit chief for about 5 years before he was promoted to his present position. Dr. Castaneda related that when he was a unit chief he effectively recommended the discharge of a doctor and other personnel. He said the unit chiefs have authority over everybody who works in the unit, could select and effectively recommend doctors for hiring, and prevent the hiring of other personnel if they disapproved of them. Each unit chief did not have greater authority than any other unit chief.

On May 13, 1993, Dr. Kermani issued a warning notice to one of the doctors in his unit. It concluded by saying that if the doctor failed to perform properly, "then necessary action will be taken against you." He had written a critical memorandum to the same doctor on May 11, 1993.

Dr. Wallack testified that unit chiefs participate in the hiring process, they interview candidates before a decision is made, and he gives significant weight to their recommendations. Dr. Graham and Dr. Portnow each wrote a memorandum which shows their involvement in the hiring process. Dr. Portnow located a prospective employee.

Dr. Castaneda testified that the unit chief would determine the philosophy of treatment prevailing on the unit. This included not only supervising the doctors but the integration of all the disciplines. The unit chief has discretion to assign cases according to the capabilities of the doctors and usually has less cases because of his other responsibilities. As a rule, the cases should not be distributed by rote.

Dr. Castaneda has weekly meetings with unit chiefs to announce new information about policies, practices, and regulations. The unit chiefs are responsible for disseminating information and implementing instructions in their units with regard to all staff, not just doctors. It is the responsibility of the unit chief to make sure that the legal status of all patients is correct. Dr. Graham, as unit chief, wrote a lengthy memorandum to a state official on June 9, 1993, concerning the discharge of a patient. He stated, "I, as Unit Chief met with Ms. Irene Freedberg, Associate Director of Social Work, Ms. Wilma Shochat, Associate Director of Social Work, and . . . treating doctor, Dr. Gerard Sunnen." He took responsibility for this matter and directed the treating doctor and other personnel.

On October 12, 1992, Dr. Castaneda sent a detailed memorandum to all unit chiefs concerning upgrading of inpatient programs. On October 19, 1992, Dr. Kermani responded in detail and stated there was a need to improve staffing. On May 6, 1993, Dr. Kermani gave a further report on what he had done in his unit. He also stated, "I have made myself available 24 hours a day, seven days a week." A detailed memorandum from Dr. Portnow to Dr. Castaneda describes new programs he wanted to implement with staffing and space needs.

The unit chiefs are responsible for the charting (preparation and maintenance of proper medical records) in the unit. Documents in evidence show the department expected the unit chiefs to make sure the doctors in their units performed proper charting. Similarly, the unit chiefs were expected to see that doctors in their unit did proper documentation in connection with restraint and seclusion episodes.

The unit chiefs are responsible for scheduling vacation for doctors and making sure they worked their scheduled hours. As Dr. Castaneda testified, "I have 50 people . . . I'm not . . . granting each one of them their vacations." The form used for vacations requires the unit chief's signature and it is the unit chief's responsibility to make sure the unit is adequately staffed. Similarly, the unit chief is responsible for scheduling days off. Documents show that Dr. Kermani adjusted the hours of the doctors in his unit and was expected to make sure they worked their scheduled hours. Dr. Graham, as unit chief, responded to a memorandum concerning the scheduling of days off.

The unit chiefs did written evaluations of the doctors working in their units. When Dr. Graham wrote to Dr. Trujillo complaining about the evaluation system, Dr. Trujillo responded to Dr. Graham, as unit chief, showing that unit chiefs were responsible for the evaluations and that their input would be considered.

According to the Respondent the evidence shows that Drs. Graham and Kermani wrote a number of memorandums demonstrating their supervisory or managerial status. In one, Dr. Graham referred to "my staff" and discusses the physical needs of the unit. He wrote about a petition by patients for supervised smoking privileges. He requested a status report on a leak. Dr. Kermani wrote about a policy matter, lack of patient transport, and the need for a unit secretary.

Dr. Castaneda testified concerning the responsibility of the unit chief to oversee patient care matters and investigate and report on any problems. The unit chief attends a number of meetings, and goes on rounds. "He is the only conduit of information between the director and the attendings on the unit." Unit chiefs attend quality assurance meetings and are expected to make recommendations to improve patient care. The unit chief is responsible for coordinating the teaching activities on his unit. He assigns students to the doctor he feels is best qualified to provide education and supervision.

Dr. Geller testified that he had no responsibility to supervise the other doctor in his unit. He testified that he was very successful in mediating disputes in his unit. The Respondent asserts that this shows that he was responsible for resolving disputes whether he resolved them by mediation or a more authoritarian process. He attended unit chief meetings, communicated the information to the other doctors in his unit, reviewed charts, assigned vacations, and approved requests for time off.

Dr. Portnow testified that unit 21 North had three individual practices and appeared to take no responsibility for the other two. He admitted that he attended unit chief meetings and communicated the information to other doctors. He admitted doing a written evaluation of another doctor and signing an approval form in connection with time off. He testified that all the supervisory responsibility belonged to Dr. Castaneda and Dr. Levy. He said he didn't do 90 percent of the duties listed in the job description for unit chief.

Dr. Castaneda testified that there was a job description in existence for many years for the unit chief position and that it was kept in the policy manual at the nursing station in each unit. All four alleged discriminatees denied that they had ever seen a job description to their position even though one allegedly existed and was kept in the policy manual in their unit. Dr. Graham testified that when Dr. Trujillo came to the department there was an aborted effort to draw up a job description for the inpatient unit chief but "nothing ever came of it because it would have had to be agreed to by the unit chiefs and it was never finished." Dr. Graham related that Dr. Portnow was appointed to head a committee to do so. Dr. Castaneda pointed out that he had not made them unit chiefs but had found them in place when he was promoted to director.

Credibility

In determining the credibility of the respective witnesses here, I have carefully considered the record evidence and have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole. *Gold Standard Enterprises*, 234 NLRB 618 (1972); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976). I tend to credit the account of

what occurred here as given by the General Counsel's witnesses. Their testimony was given in a believable and forthright manner, was generally consistent and corroborative of each other, and with other evidence present in the record. In contrast the testimony of the Respondent's witnesses, was inconsistent at times and I especially found the testimony and the demeanor of Dr. Trujillo to be less than credible. In fact it should also be noted that Dr. Trujillo's testimony even supports that of the General Counsel's witnesses in some instances.

C. Analysis and Conclusions

The complaint alleges that the Respondent threatened its employees with cutbacks, layoffs, and other consequences if they continued their protest activities in violation of Section 8(a)(1) of the Act. The Respondent denies this allegation.

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory right to engage in, or refrain from engaging in concerted activity. It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.²⁸ This provision is modified, however, by Section 8(c) of the Act, which defines and implements the first amendment right of free speech in the context of labor relations. *NLRB v. Four Winds Industries*, 53 F.2d 75 (9th Cir. 1969). Section 8(c) permits employers to express "any views, arguments or opinions" concerning union representation without running afoul of Section 8(a)(1) of the Act if the expression "contains no threat of reprisal or force or promise of benefit." *NLRB v. Marine World USA*, 611 F.2d 1274 (9th Cir. 1980); *NLRB v. Raytheon Co.*, 445 F.2d 272 (9th Cir. 1971). The employer is also free to express opinion or make predictions, reasonably based in fact, about the possible effects of unionization on its company. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). In determining whether questioned statements are permissible under Section 8(c), the statements must be considered in the context in which they were made and in view of the totality of the employer's conduct. *NLRB v. Marine World USA*, supra, *NLRB v. Lenkurt Electric Co.*, 438 F.2d 1102 (9th Cir. 1971). Also recognized must be the economically dependent relationship of the employees to the employer and the necessary tendency of the former, because of the relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. *NLRB v. Gissel Packing Co.*, supra at 617; *NLRB v. Marine World USA*, supra.

The undisputed evidence shows that the Respondent conducted three separate staff meetings with the psychiatrists in which Dr. Trujillo and/or Brier announced that the psychiatrist would no longer be able to work on-premises at Bellevue from 9 a.m. to 3 p.m. without a salary reduction or additional work hours, because of budgetary problems. After the initial meeting on September 30, 1994, the Respondent requested that the psychiatrists return a memorandum selecting either a salary reduction or additional work hours.

The record shows that Drs. Graham, Portnow, Mahon and Kermani, the selected representatives of the Association's Executive Board, all spoke out forcefully at these meetings against the Respondent's announced change in policy. The evidence further shows that the Association met and discussed the issue, advised its members to return the memorandum "under protest," which many did, and later submitted a proposal on the 9 a.m. to 3 p.m. issue which Dr. Trujillo rejected.

Thus, the evidence clearly establishes that the Association and its members psychiatrists engaged in a series of concerted actions in protest against the Respondent's announced changes in their working hours and that the Respondent was aware of such activities.

In early October 1994, the Respondent conducted the second of the above-described "9 to 3" staff meetings in the Rose Room at Bellevue. At this meeting, Dr. Mahon strongly opposed the change indicating that she had been hired to work from 9 a.m. to 3 p.m. at a lower salary and questioned why these doctors were being penalized, and why there was a need for so many administrators. After the meeting, while Dr. Portnow was waiting for an elevator, Dr. Trujillo remarked that Dr. Mahon's behavior was "disgraceful, disloyal, undesirable and that it would lead to 'trouble' for the attendings."

Dr. Portnow testified that the same day or the day after, while Dr. Portnow was in Dr. Trujillo's office, Dr. Trujillo told him that the Association would be "punished" for its position on the 9 a.m. to 3 p.m. issue, that it was a political issue and that they should have taken the offer of renegotiating their worktime to eight-tenths. When Dr. Trujillo was asked whether he made the foregoing statement to Dr. Portnow, Dr. Trujillo responded that he often told the "gurus" that if they did not do something "constructive" to deal with the 9 a.m. to 3 p.m. issue, there would be further budgetary problems, that the problem would just get worse and effect everybody. Dr. Trujillo admitted that he may have told Dr. Weiss, as well as other "gurus" that "it was not a good idea, in a budgeting shortness to have an open issue like the 9:00 to 3:00. It makes you very visible for the chopping block."

The record is replete with evidence of statements of animus by Dr. Trujillo toward the Association and the Association's executive board and would lend credence to the view that Dr. Trujillo would not hesitate to tell the Association that it would be "punished" for opposing a change in the 9 a.m. to 3 p.m. work schedules. The Respondent's contentions that Dr. Trujillo was simply trying to warn the psychiatrists that a failure to resolve the 9 a.m. to 3 p.m. issue would cause more budgeting problems and possibly layoffs is irrelevant. However, given Dr. Trujillo's demonstrated history of animus toward the Association and its officers, no reasonable person would have believed that Dr. Trujillo's pronouncements were anything but a threat. This remains true even if one credits Dr. Trujillo's statement that a failure to resolve the 9 to 3 issue makes the psychiatrists "very visible for the chopping block." From all of the above, I find and conclude that the Respondent violated Section 8(a)(1) of the Act by threatening to punish employees implicitly with layoff, cutbacks, and other consequences if they continued their protected concerted protests, since it tended to restrain

²⁸ *American Freightways Co.*, 124 NLRB 146 (1959).

and coerce employees in the exercise of their Section 7 rights.

1. The discharges

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Drs. Graham, Kermani, Geller, Steiner, Portnow, and Mahon because they joined, supported, or assisted the Association and engaged in concerted activities concerning terms and conditions of employment or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Respondent denies these allegations.

Section 8(a)(3) of the Act make it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Under the test announced in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), a discharge is violative of the Act only if the employee’s protected conduct is a substantial or motivating factor for the employer’s action. If the General Counsel carries his burden of persuading that the employer acted out of antiunion animus, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries*, 114 S.Ct. 2552–2558 (1994); *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334 (D.C. Cir. 1995); *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, supra. Also see *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616 (7th Cir. 1991).²⁹ However, when an employer’s motives for its actions are found to be false, the circumstances may warrant an inference that the true motivation is an unlawful one that the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1960); *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *Golden Flake Snack Foods*, 297 NLRB 594, 595 fn. 2 (1990). See also *Peter Vitale Co.*, 313 NLRB 970 (1994). The motive may be inferred from the total circumstances proved. Moreover, the Board may properly look to circumstantial evidence in determining whether the employer’s actions were illegally motivated. *Asociacion Hospital del Maestro*, 291 NLRB 198 (1988); *White-Evans Services Co.*, 285 NLRB 81 (1987); *NLRB v. O’Hare-Midway Limousine Service*, 924 F.2d 692 (7th Cir. 1991). That finding may be based on the Board’s review of the record as a whole. *ACTV Industries*, 277 NLRB 356 (1985); *Heath International*, 196 NLRB 318 (1972).

In carrying its burden of persuasion under the first part of the *Wright Line* task the Board requires the General Counsel first to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision.

²⁹ An employer simply cannot present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct *T & J Trucking Co.*, 316 NLRB 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990).

Manno Electric, Inc., supra at fn. 12; *Wright Line*, supra. In establishing unlawful motivation, the General Counsel must prove not only that the employer knew of the employees union activities or sympathies, but also that the timing of the alleged reprisals was proximate to the protected activities and that there was antiunion animus to “link the factors of timing and knowledge to the improper motivation.” *Hall Construction v. NLRB*, 941 F.2d 684 (8th Cir. 1991); *Service Employees Local 434-B*, 316 NLRB 1059 (1995).

From all of the above. I am persuaded that the General Counsel has established that a motivating factor in the discharge of the six alleged discriminatees was their protected concerted activities based on the abundant evidence of animus toward the Association and its various executive board members on the part of the Respondent, their open opposition to the change in the 9 to 3 work schedule and other activities on behalf of the psychiatrists and the Respondent’s knowledge thereof,³⁰ the unlawful implicit threats of cutbacks, layoffs and other consequences if they continued to protest such change, and the timing of the discharges relative to their protected activity. Accordingly, the burden shifts to the Respondent to establish that it would have terminated Drs. Graham, Kermani, Geller, Steiner, Portnow and Mahon even in the absence of their protected concerted activities. *Office of Workers’ Compensation Programs v. Greenwich Collieries*, supra; *Wright Line*, supra.

The Respondent asserts that the layoff of the six alleged discriminatees was not in violation of Section 8(a)(1) and (3) of the Act because it was motivated by a reduction in budget mandated by the Health and Hospital Corporation of New York City and based on the Respondent’s judgment concerning the best personal to operate the reorganized department and not by their activity on behalf of the Association.

I do not agree.

The record as a whole establishes that Dr. Trujillo opposed the very existence of the Association and that when it became clear that the Association was actively going to oppose his actions, Dr. Trujillo responded by refusing to continue to meet with the Association, by berating and disparaging its leaders, by attempting to induce some of them to abandon the Association or to “cooperate” with him, by threatening them, by trying to influence their elections and failing that, by terminating them at his first opportunity.

From the evidence here, I find that the Respondent has failed to meet its burden of persuading that it would have taken the same action against the six alleged discriminatees here even if they had not engaged in protected activity.³¹

In each case individually, the evidence shows that the Respondent terminated Drs. Kermani, Portnow, Geller, Graham, Mahon, and Steiner because of their leadership and support of the Association and its activities.

³⁰ At the meetings when the 9 to 3 issue was discussed between management and the psychiatrists, the executive board members of the Association strongly voiced their opposition to the change. The alleged discriminatees were all members of the Association’s executive board.

³¹ *Office of Workers’ Compensation Programs v. Greenwich Collieries*, supra; *Manno Electric*, supra; *Wright Line*, supra.

Dr. Ebrahim Kermani

The evidence establishes that Dr. Kermani was one of the most eminently qualified psychiatrists employed at Bellevue. Dr. Kermani had worked at Bellevue for 25 years and was the unit chief of Bellevue's medical-psychiatric unit, one of few such units in the nation, for the past 15 years. Dr. Kermani was also a full clinical professor at NYU's School of Medicine, was board-certified in psychiatry and neurology, child psychiatry, and forensic psychiatry, and was the author of approximately 25 academic articles, including articles on AIDS, as well as a book on forensic psychiatry. In addition, since 1990 Dr. Kermani has been the vice president of the Association.

Despite such achievements, the evidence shows that Dr. Kermani was a particular, recurring target of Dr. Trujillo's animosity toward the Association and its activities. First, the evidence shows that Dr. Trujillo attempted to place Dr. Kermani on probation for 6 months for seeking the assistance of the Association after a series of unwarranted "counseling" sessions by Dr. Trujillo. Dr. Kermani's probation was revoked only after the Association filed an unfair labor practice charge against the Respondent and the Regional Director issued a complaint. Undaunted, a year later Dr. Trujillo warned Dr. Kermani to "disassociate" himself from Drs. Kirshbaum and Graham and when Dr. Kermani refused, threatened to "shoot them through you . . . Next time there will be no Association that you went to for cove."³²

The credited testimony of Dr. Geller further shows that Dr. Trujillo stated that he regarded Dr. Kermani, among others, as being "detrimental" to the department of psychiatry and that he wished he could get rid of him. Dr. Portnow also testified that Dr. Trujillo specifically named Kermani as one of the people that he would not accept on his so-called "guru" committee. Moreover, although the uncontroverted evidence shows that the so-called "mission" of the medical-psychiatric unit was not changed as a result of the reorganization, the Respondent terminated Dr. Kermani anyway.

The Respondent's witnesses offered a myriad of various reasons why Dr. Kermani was terminated. Dr. Wallack stated that the internists, not Dr. Kermani, were providing the primary "leadership" on the unit and that they needed someone who could better integrate the medical and psychiatric care of the patients on the unit. Dr. Wallack further stated that he spoke to Dr. Kermani about such matters in terms of his "goals" for the unit. Dr. Castaneda testified that the most important factor was that Dr. Kermani had difficulty "implementing policies" and "mobilizing" the team to provide an efficient treatment program on the unit. Dr. Trujillo related that he recalled that Dr. Castaneda and the other administrators said that Dr. Kermani did not have the updated clinical skills to run a hyper-acute unit, that he lacked the "leadership" skills and could not ensure that the documentation and quality assurance programs would be implemented.

Although Dr. Castaneda acknowledged that "he had no responsibility for the walk-in clinic and that he merely had

"some idea" of its function, he testified that he recommended that Dr. Buckingham replace Dr. Kermani as unit chief. Aside from his experience in treating medical-psychiatric patients, Dr. Buckingham's unique qualification was that he was board-certified in family medicine.

The Respondent's explanations for Dr. Kermani's termination are completely unsubstantiated. There is not a single memorandum by the Respondent criticizing Dr. Kermani for any of his alleged deficiencies nor is there any probative testimony that Dr. Kermani was verbally warned to improve his performance. In view of Dr. Kermani's breadth of experience and expertise, the Respondent's testimony that he lacked "leadership" skills appears self-serving and is worth little, if any, consideration. In that regard, the Respondent also completely failed to show how Dr. Buckingham's certification in family medicine is of any use in a medical-psychiatric unit. On the other hand, Dr. Castaneda readily acknowledged that Dr. Kermani's familiarity and expertise in the area of AIDS are very useful in such a unit.

In view of Dr. Kermani's demonstrated experience and qualifications, Dr. Trujillo's continuous animosity toward him and the Association, and the inadequate reasons advanced by the Respondent to explain his termination, it is clear that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Dr. Kermani.

Dr. Stanley Portnow

Like Dr. Kermani, the record shows that Dr. Portnow was one of the most highly qualified and experienced psychiatrists at Bellevue. Dr. Portnow was employed by the Respondent at Bellevue for 26 years, of which 21 were spent as a unit chief. In that regard, Dr. Portnow served as the unit chief of the forensic unit for 3 years. Dr. Portnow was also a full clinical professor at NYU's School of Medicine. He is certified in forensic psychiatry as well as psychiatry and neurology and has expertise in psychoanalysis, psychopharmacology, brief psychotherapy, and hypnosis. Dr. Portnow has written or coauthored 10 academic articles, has been a consultant or adviser to countless organizations, and has delivered almost 100 lectures on various topics in the field of psychiatry. Recently, New York magazine named Dr. Portnow one of "The Best Doctors In New York."

In the early 1970s, Dr. Portnow helped found the Association and was elected to its executive board in the fall of 1994. As discussed below, Dr. Trujillo's particular animus toward Dr. Portnow stemmed from his "failure" to use his influence to defeat Dr. John Graham's reelection as president of the Association.

It appears from the record that Dr. Portnow was the person to whom Dr. Trujillo stated that he would "punish" the Association for its position on the 9 to 3 issue. In the same time period, after Dr. Trujillo's hand-picked candidate, Dr. Kirschbaum, refused to run and Dr. Graham was reelected president of the Association, the credible evidence shows that Dr. Trujillo blamed Dr. Portnow and stated, "You're the one they respect. You're the one they would listen to and you failed me." Asked about this statement, Dr. Trujillo remarked, "Well, I—you know had high hopes for Dr. Portnow. He failed to persuade other people of my advise to him. He failed to persuade other people, which he did."

The memo shows that 21 North was converted to an "acute" unit which was responsible for continuing the sta-

³² I am aware of the "serious incident" involving the suicide of one of Dr. Kermani's patients. This however does not seem to be a part of the reason for his termination subsequently. Moreover, the Respondent mistakenly states in its brief that Dr. Kermani received a poor evaluation from Dr. Castaneda. A review of his evaluation shows a fair or satisfactory rating.

bilization of the patients and completing the requisite documentation for their disposition to state- or community-bound facilities. For its type of unit, Dr. Castaneda stated that it was particularly important to have someone who could implement therapeutic programs.

Dr. Wallack stated that Dr. Portnow was felt to be a "weak" manager and that 21 North had a long history of patients with excessively long lengths of stay. Dr. Castaneda stated that Dr. Portnow's lack of "leadership" was "overwhelming," that he had failed at implementing therapeutic programs and that there had been complaints concerning the manner in which the unit had been run. Dr. Wallack maintained that Dr. Weiss had a demonstrated ability to get people through treatment and into the community faster than the other unit chiefs and that Dr. Weiss was "far and above" more capable of running a community-bound unit than anyone else. Although the Respondent maintained but did not adduce any documents containing LOS statistics, Dr. Castaneda testified that Dr. Weiss had the *longest* LOS statistics for the general adult wards.

In his rebuttal to Dr. Castaneda's evaluation, Dr. Portnow noted that 21 North had been acclaimed for its over intensive group psychotherapy program, reasonable length of stay, minimum 30-day readmissions, charting, and infrequent use of restraint and seclusion procedures. Dr. Portnow further stated that he had trained at the Meninger Foundation which he stated is "synonymous" with the term "therapeutic milieu" and that his wards had always received high marks in that regard.

The totality of the evidence shows that Dr. Portnow's termination made absolutely no sense and could have only been the result of Dr. Trujillo's animus toward him and the Association. The Respondent's stated reasons for Dr. Portnow's termination are materially inconsistent and unsubstantiated. In that regard, the Respondent claimed that Dr. Portnow's ward had high LOS numbers but did not adduce any documents substantiating this claim, even though such records are kept on a daily basis, by individual doctors and by ward. Moreover, one administrator, Dr. Wallack, claimed Dr. Portnow's replacement, Dr. Weiss, had a demonstrated ability to treat and dispose of patients quickly while Dr. Castaneda testified that Dr. Weiss had the highest LOS statistics for adult patients at Bellevue.

As a whole the Respondent's decision to terminate the discriminatees is highly suspect, to say the least. For one thing, although the Respondent closed only one ward, it terminated *four* highly experienced unit chiefs. —Drs. Kermani, Portnow, Geller, and Graham. At the same time, the Respondent retained at least 11 psychiatrists who had 5 years or less of experience at Bellevue. Except for Dr. Halamandaris and perhaps Dr. Ravelo, there was no testimony that these doctors had any unique qualifications which would insulate them from termination.

What is clear is that Dr. Trujillo continually demonstrated animus against the Association and its executive board members, and that he was particularly upset with Dr. Portnow for failing to use his influence to defeat Graham's reelection as president.

Given Dr. Portnow's unquestioned qualifications and experience, the conflicting and unsubstantiated reasons offered by the Respondent for Dr. Portnow's termination, and Dr. Trujillo's general animosity toward the Association, its executive

board as well as Dr. Portnow's "failure" to defeat Dr. Graham's reelection, it is abundantly evident that the Respondent unlawfully discharged Dr. Portnow in violation of Section 8(a)(1) and (3) of the Act.

Dr. Martin Geller

Dr. Geller was employed by the Respondent at Bellevue for 27 years and served as a unit chief for 21 years. He was also an associate clinical professor at NYU's School of Medicine.

Dr. Geller had been an elected member of the Association's executive board since 1980. Much like Dr. Portnow, the evidence shows that Dr. Geller became a target of Dr. Trujillo's hostility because he would not disavow the Association and because he dared to tell Dr. Kermani that Dr. Trujillo had accepted his 7:30 a.m. to 3 p.m. work schedule.

Shortly after Dr. Trujillo arrived at Bellevue, Dr. Geller testified Dr. Trujillo said that he had heard very good things about Dr. Geller and about the unit that he worked on, that it was one of the finer units at the hospital, and that he was one of the finest physicians there. Nonetheless, Dr. Geller stated Dr. Trujillo said he was "distressed" that the doctors would set themselves up in an "adversarial" position with respect to the management of the hospital, and particularly to himself, that they would possibly work counter to the aims of the director, that at a time of crisis, when it was very important for the psychiatry department to move forward, he felt that this was a "destructive" activity. When Dr. Geller spoke up for the Association, he testified that Dr. Trujillo said there could be no such thing as a union of physicians, that such a thing should cease to be, and that we should more or less straighten up our act and cooperate with him and help him to bring the department forward. Subsequently, Dr. Geller stated that Dr. Trujillo warned him that he was doing himself no favors by linking himself with people who he regarded as being "detrimental" to the department, like Drs. Kermani, Graham, and Mahon. Dr. Geller stated Dr. Trujillo said that he should either "sever" himself from the Association or use whatever influence he could to get the executive board to cooperate with Dr. Trujillo. In late 1994, Dr. Geller stated that Dr. Trujillo said he had high esteem for Drs. Geller and Weiss but that if he had his way, he would be glad to get rid of people like Drs. Kermani, Graham, Mahon, and Kirschbaum.

After learning that Dr. Geller apparently had told Dr. Kermani that Dr. Trujillo had agreed to accept his 7:30 a.m. to 3 p.m. schedule, Dr. Geller testified that Dr. Trujillo said, "Marty, you really fucked it up . . . Now I can't do what I promised . . . You talk too much." When Dr. Geller protested, he stated Dr. Trujillo said, among other things, "You fucking people, you don't give a damn about the future of the department. All you care about is yourselves."

Dr. Wallack stated that residents and staff complained about Dr. Geller's performance and that the senior leadership became concerned over his quality of teaching and supervision of residents. As a result, Dr. Castaneda testified that a meeting with the residents was held on September 20, 1994, without Dr. Geller to address the complaints. In response to the criticisms allegedly made at the meeting, Dr. Geller wrote a memorandum to Drs. Castaneda and Bernstein detailing proposed changes to the manner in which the unit was run. However, Dr. Castaneda testified that Dr. Geller

was not successful in implementing many of his proposals and faulted Dr. Geller for his alleged inability to “rein in” Dr. Ambrose or to provide adequate treatment planning. Dr. Castaneda further stated that Dr. Geller was deficient in scheduling events, allocating staff and devising a treatment milieu. Dr. Castaneda also stated Dr. Geller’s command of psychopharmacology was poor and cited an instance in which Dr. Geller allegedly admitted he did not know Valium was classified as a benzodiazepine.

Although he described the decision to terminate Dr. Geller as a difficult one, Dr. Wallack stated that the Respondent would have probably made a change in the “leadership” of the unit regardless of the layoffs.

Dr. Castaneda’s written performance evaluation of Dr. Geller shows that he was rated “good” or “outstanding” in 9 of 11 categories, including “outstanding” ratings in diagnostic/assessment skills and teaching skills. Moreover, both Dr. Castaneda and Dr. Wallack described Dr. Geller as extremely devoted, hard working, and one of the Respondent’s most popular psychiatrists. Dr. Wallack stated that he probably had more feedback from around the nation about Dr. Geller’s termination than anyone else. To replace Dr. Geller, the Respondent designated Dr. Halamandaris as acting unit chief and reassigned Dr. Sussman from an out-patient unit listed as the “Biological Psychiatry—Psychopharmacology Service.”

On the whole, the Respondent’s explanations for terminating Dr. Geller are simply not credible. It is completely implausible that Dr. Geller could function as the unit chief of Bellevue’s only training unit for 21 years, receive an outstanding written performance evaluation from Dr. Castaneda in 1993 (the only individual evaluations performed in many years) and then have his performance deteriorate so much over the following year as to merit termination regardless of the budget crisis. Although there may have been complaints by the residents about their training, the manner in which these complaints were treated by the Respondent is highly suspicious. It simply strains credibility to believe that Dr. Geller was terminated because of the complaints of some residents. This is inconsistent with Dr. Wallack’s testimony that Dr. Geller was one of the Respondent’s most popular physicians. Dr. Castaneda’s testimony also does not ring true. It is difficult to believe that he could give Dr. Geller above average or outstanding ratings in March 1993, and then testify that he was terminally deficient in basic skills such as devising a treatment milieu or that his command of psychopharmacology was poor. In the latter instance, Dr. Geller’s testimony shows that the fact that he did not know Librium was a benzodiazepine is completely meaningless.

Given the Respondent’s far-fetched explanations for Dr. Geller’s discharge, we are left with Dr. Trujillo’s animus toward Dr. Geller for telling Dr. Kermani about their so-called special deal. In this regard, Dr. Trujillo’s overreaction is consistent with the tenor of his memorandum to Dr. Kermani which reprimanded him for “unilaterally” disseminating information to the Association and its members. Moreover, apart from such animus, there was no ostensible reason for Dr. Trujillo to react as he did inasmuch as Dr. Geller’s hours—7:30 a.m. to 3 p.m.—already satisfied HHC’s demand that each physician work 7-1/2 hours each day.

When one considers Dr. Geller’s years of service as a unit chief in the training unit, his largely unblemished work his-

tory, the Respondent’s inconsistent and implausible justifications for his termination, and Dr. Trujillo’s evident animus toward him and the Association, I can only consider that the Respondent terminated him in violation of Section 8(a)(1) and (3) of the Act.

Dr. John Graham

Dr. Graham was employed by the Respondent at Bellevue for 27 years, 19 of which he served as a unit chief. Dr. Graham was also an associate clinical professor at NYU’s School of Medicine and was certified by the American Board of Psychiatry and Neurology.

Dr. Graham has been a member of the Association since it was founded and has been president of the Association since 1990. During that time, the record also shows that he has been the main proponent of the Association in its dealings with Dr. Trujillo and the Respondent. Accordingly, the record shows that on behalf of the Association Dr. Graham sent Dr. Trujillo various memoranda regarding issues such as wages, working hours, disciplinary grievances, the physician evaluation process, etc. The record shows that the bulk of these memoranda were sent between February 13, 1992, and May 19, 1993. Shortly thereafter, as noted supra, Dr. Trujillo refused to continue meeting with the Association.

The credible evidence shows that Dr. Graham has been the unerring target of Dr. Trujillo’s scorn and hostility since the inception of the latter’s employment at Bellevue. The testimony of numerous witnesses for the General Counsel show that Dr. Trujillo has called Dr. Graham a “headache,” described him as being “incompetent” and “detrimental” to the department, stated that he wrote idiotic letters and even stated that he would like to get rid of him. The evidence further shows that Dr. Trujillo attempted to induce Drs. Kermani and Geller to “disassociate” themselves from Dr. Graham and the executive board and that he actively tried to persuade Dr. Portnow to defeat Dr. Graham’s bid for reelection to the presidency of the Association.

The evidence also shows that 18 South was converted into an “intensive treatment” unit with a target LOS of 14 days. The memo states: “Medical staff will be expected to complete a thorough medical and psychiatric assessment, initiate psychotherapy and other therapeutic modalities as indicated, and make a prompt determination regarding likely disposition.” Both Drs. Graham and Chan were terminated and Dr. Kirschbaum, and Drs. Hames, Stockfish and Welner were reassigned to the unit.

Dr. Wallack stated that the Respondent received numerous complaints about Dr. Graham and cited problems with a precipitous discharge, an inappropriate emergency room referral, incomplete discharge summaries, and lapsed legal status of patients. Dr. Wallack further testified that they had tried to work with Dr. Graham but found that he responded in ongoing “defiance and oppositional behavior.”

Dr. Castaneda testified that Dr. Graham had severely impaired leadership skills, that he had difficulty assimilating new information, that he was unable to consider his shortcomings, and that he was given to “grandstanding—speaking to some audience instead of ever engaging a discussion of the issues.” Dr. Castaneda further stated that Dr. Graham’s interactions with the directors of the other disciplines were extremely negative and that 18 South functioned poorly and had the most complaints from other agencies.

In support of these contentions, the Respondent adduced approximately a dozen memoranda regarding performance-related problems of Dr. Graham, of which all but two were dated between June 16, and December 27, 1993. In the memorandum dated December 27, 1993, Dr. Wallack noted Dr. Graham's "consistently oppositional stance" and stated that he was "invariably challenging and argumentative-choosing diatribe over cooperation." After enumerating Dr. Graham's alleged deficiencies, Dr. Wallack directed Dr. Graham to "immediately take steps to correct [the] deficiencies." Dr. Wallack admitted that he did not anticipate that Dr. Graham would be able to make substantive changes and that he would have to make a "change" on the unit. Prior to June 1993, Dr. Graham recalled receiving one disciplinary memorandum involving a single incident of absenteeism.

Dr. Graham testified that he did not see the memoranda dated June 16, July 13, and August 6, until he met with Dr. Castaneda on September 22 and that he never received Dr. Wallack's memorandum dated December 27. After he met with Drs. Wallack, Castaneda and Varas on December 23, Dr. Graham sent Dr. Wallack a memorandum requesting documentation of the criticisms made against him but never received a response.

On December 29, 1993, Dr. Graham stated that Dr. Trujillo told him that he just had to "amend a few things," that no one was looking for his job. Subsequently, except for memoranda dated November 22 and 23, 1994, from Dr. Castaneda requesting, and acknowledging the receipt of, a list of inappropriate admissions, there were no further performance-related memoranda sent to Dr. Graham. Indeed, for the 3-year period preceding the terminations, Dr. Castaneda testified that 18 South had the lowest LOS statistics.

A review of the evidence reveals that Dr. Graham was discharged not because of performance-related problems but rather because he was the outspoken leader and president of the Association.

At the threshold, it is noteworthy that the flood of performance-related memoranda concerning Dr. Graham began the day after counsel for the Association signed the unfair labor practice charge filed by the Association on Dr. Kermani's behalf. Given the fact that Dr. Graham had received only one such memorandum in his preceding 25 years of employment at Bellevue, this hardly appears coincidental. Moreover, the Respondent offered no credible explanation as to why Dr. Graham did not receive many of these memoranda in or about the date they were supposedly issued. Instead, he was presented with several of the memoranda at once in a so-called counseling session with Dr. Castaneda which was followed by yet another disciplinary memorandum summarizing the September 22 meeting. It is also highly suspect that Dr. Graham never received Dr. Wallack's memorandum dated December 27, 1993, which essentially could be characterized as a final disciplinary warning. Even more troublesome is the fact that the Respondent offered no explanation as to why Dr. Graham's 1993 performance evaluation was apparently downgraded after Dr. Castaneda reviewed it with Graham. (Compare G.C. Exh. 28 and R. Exh. 4.) In sum, these developments suggest that Dr. Graham was being "set up" for possible termination because of the Association's activities.

Secondly, assuming *arguendo* that Dr. Graham did experience performance problems during 1993, there is little evidence that such problems existed thereafter. Subsequently, the sole performance-related memorandum issued by Dr. Castaneda to Dr. Graham alleged that he was delinquent in submitting an inappropriate referral list to him. This action was, in effect, rescinded by Dr. Castaneda's memorandum of the next day alluding to a "misunderstanding" about the assignment. Therefore, the evidence fails to show that Dr. Graham's performance was substandard in or about the time he was terminated.

In fact, the only objective criteria cited by the Respondent, unsubstantiated as it may be, shows that Dr. Graham's unit had the lowest LOS statistics at Bellevue for the 3-year period preceding his termination! Objectively, there could not be a more important criterion for selecting personnel for the so-called "intensive" units created by the Respondent's restructuring. Yet, instead of assigning Dr. Graham to one of these units, the Respondent transferred Dr. Stockfish, a fellow-in-training, and Dr. Welner, who was on loan from the forensic unit, to 18 South.

More than any other member of the executive board, the record clearly demonstrates that Dr. Trujillo disliked Dr. Graham for, among other concerted actions, his continuous and adversarial attacks on the administration, for the Association's filing of Kermani's unfair labor practice charge, and finally for the Association's openly "adversarial" position on the 9 to 3 issue.

Thus, the foregoing evidence clearly demonstrates that such animus was the reason Dr. Trujillo got "rid of Dr. Graham," as he had threatened to do. Therefore, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Dr. Graham.

Dr. Maeve Mahon

Dr. Mahon has practiced psychiatry since 1978 and was employed by the Respondent at Bellevue for 8 years. She was also an assistant clinical professor at NYU's School of Medicine and is board-certified in psychiatry and neurology.

Dr. Mahon has been a member of the executive board of the Association since 1992. During the so-called 9 to 3 meetings, the uncontroverted evidence shows that Dr. Mahon was an outspoken critic of the Respondent's announced plans to eliminate 9 to 3 work hours at Bellevue.

Like the other members of the executive Board, the evidence shows that Dr. Trujillo directly expressed animosity toward Dr. Mahon. Immediately after the 9 to 3 meeting held in the Rose Room, the testimony of Dr. Portnow shows that Dr. Trujillo said that Dr. Mahon's behavior at the meeting was "disgraceful, disloyal, undesirable and that it would lead to trouble for the attendings." The testimony of Dr. Geller further establishes that on more than one occasion Dr. Trujillo told him that he would like to get rid of Dr. Mahon, among other members of the executive board.

Dr. Wallack said that other disciplines had problems with Dr. Mahon's attitude and performance and that there had been difficulties in getting her to cooperate with "changes in the systems." Dr. Castaneda testified that Dr. Weiss and persons from other disciplines complained that Dr. Mahon was difficult to work with, that she would not listen to other people, and that she was not a "team player." Although intelligent and knowledgeable, Dr. Castaneda stated Dr. Mahon

was not even regarded as an average attending psychiatrist. However, on Dr. Mahon's 1993 performance evaluation, Dr. Weiss rated her "good" or "outstanding" in six of eight categories, including a "good" rating in the area entitled "Working Relationships with Staff."

Dr. Wallack related that when the Respondent looked at the reductions in nursing, social work, and the psychiatrists, they "obviously" tried to preserve as many beds as possible and decided to close 20 South, a relatively small 19-bed unit.

The foregoing evidence amply demonstrates the lack of credibility that should be accorded the testimony of Dr. Wallack and Dr. Castaneda. Dr. Weiss' performance evaluation of Dr. Mahon completely contradicts the gravamen of their testimony, namely that Dr. Mahon had an "attitude" and was difficult to work with. Even the rationale for the closing of 20 South is suspect inasmuch as it directly contradicts Dr. Trujillo's January 30 proposal to HHC to close the biggest unit so as to "maximize" the redistribution potential of the professionals, particularly the nurses, assigned to such a unit.

The record leaves little question that Dr. Mahon was terminated because she was an outspoken member of the executive board who dared to openly and persistently oppose Dr. Trujillo's mandate to eliminate the 9 to 3 schedules of the psychiatrists at Bellevue. It was only in this regard that she was not a "team player" for the evidence further shows that she was given an outstanding evaluation which completely contradicts the testimony of Dr. Wallack and Dr. Castaneda that she was not even an average attending or that she had difficulties working with the staff. Moreover, the record further shows that Dr. Trujillo, in effect, threatened to get rid of Dr. Mahon and characterized her vocal opposition as "disgraceful, disloyal, undesirable" behavior which would lead to "trouble."

Under these circumstances, the evidence clearly shows that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Dr. Mahon.

Dr. Jerome Steiner

Unlike the other alleged discriminatees, Dr. Steiner did not testify.

At the time of the terminations, Dr. Graham testified that Dr. Steiner was a member of the executive board and a treasurer of the Association. Dr. Graham further stated that the results of the Association's elections, the last of which occurred in the fall of 1994, are publicized.

Dr. Wallack testified that Dr. Steiner had been a problem in the consultation-liaison unit and that they had been asked by the directors to get him out of that unit. Dr. Wallack stated that Dr. Steiner had similar problems on 12 South and was not proficient in treating patients with heart disease or a need for complicated psychopharmacology. Although a competent group therapist, Dr. Castaneda described Dr. Steiner's clinical judgment as "suboptimal," and stated that he regarded him as "functioning below average." After reviewing 25 records of his work in the consultation-liaison unit, Dr. Trujillo stated that Dr. Steiner needed reassignment because his clinical skills were not up to caring for patients who were very ill or had serious disorders.

Although no evidence was adduced to show that Dr. Trujillo exhibited animus specifically against Dr. Steiner, as discussed supra, Dr. Trujillo's animus toward the members of

the executive board is evident. And, unlike Drs. Kirshbaum and Weiss, there is no evidence to suggest that Dr. Trujillo regarded Dr. Steiner as one of the more reasonable personages on the executive board.

Thus, we are left with the unsubstantiated testimony of Drs. Wallack, Castaneda, and Trujillo concerning Dr. Steiner's alleged deficiencies. In that regard, it is noteworthy that Dr. Steiner's performance evaluation was not offered into evidence. As discussed above, given Dr. Trujillo's animus and the lack of trustworthiness of the Respondent's witnesses, the totality of the evidence favors the view that the Respondent terminated Dr. Steiner because of his standing in the Association and thereby violated Section 8(a)(1) and (3) of the Act.³³

Moreover, the inconsistent and contradictory testimony of the Respondent's witnesses regarding the circumstances of the budget crises, the reorganization of the psychiatry department and the selection of the doctors to be terminated illustrates further that the Respondent's explanations for the terminations of Drs. Kermani, Portnow, Geller, Graham, Mahon, and Steiner are entirely pretextual.

In the fall of 1994, Ivan Selzer testified that HHC first proposed to cut \$2 million from the Respondent's budget for the department of psychiatry. Selzer stated that this "bottom line" never changed and he first became aware of the identities of the doctors to be laid off in the early part of 1995 when Dr. Trujillo submitted a budget reduction to Brier. However, Selzer said this plan was not the January 30 plan submitted to Brier by Dr. Trujillo and no such plan was ever adduced into evidence.

Approximately 2 months before the terminations, Dr. Wallack testified that he had no idea how many psychiatrists were going to be laid off or who they were going to be. The week before the terminations, Dr. Brier told Drs. Wallack and Trujillo that they would have to implement a plan to reduce the budget as soon as possible. In or about that time, Dr. Wallack stated that the Respondent received notice of the actual amount of the budget cut and determined that as many as a dozen psychiatrists would have to be laid off. Thereafter, Dr. Wallack stated that there were endless meetings among the administrators on the 22nd floor and that over the weekend, he spoke with Drs. Trujillo, Castaneda, and others trying to decide which of the various plans would be implemented. At the end of such discussions, Dr. Wallack stated that the Respondent arrived at a list of 10 to 12 people that they felt should be replaced or laid off.

Dr. Castaneda testified repeatedly that he initially became aware of the number of psychiatrists that were going to be laid off on the morning the terminations were announced, which was March 22, 1995. On that day, Dr. Castaneda stated that Dr. Trujillo or Dr. Wallack told him that his department was going to be cut by 9 or 10 lines. Thereafter, Dr. Castaneda stated that he took part in a series of face-to-face and/or telephone discussions with Drs. Trujillo, Wallack,

³³ As indicated, Dr. Steiner was not called as a witness here. From the failure of a party to produce a witness who may reasonably be assumed to be favorably disposed to that party an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122 (1987). However, with the testimony of the other five alleged discriminatees and the above evidence in the record, I do not give this the usual weight in this connection.

Levy and other administrators which ended in the selection of the reorganization plan to be implemented and the 10 psychiatrists to be terminated.

In or about January 1995, Dr. Trujillo testified that a \$2 million reduction became a "fixed" number and that he thought he would have to lay off as many as 20 psychiatrists. On Monday, March 20, Dr. Trujillo stated that he reached an agreement with HHC to cut 12 psychiatry lines. At approximately 5 p.m. as he was walking out of Brier's office, Dr. Trujillo stated that Brier agreed to two fewer layoffs. After he left Brier's office, Dr. Trujillo stated that he telephoned Dr. Cancro and told him that the "10 lay off plan" had to be implemented and the names of doctors who were going to be terminated.

On Tuesday morning, Dr. Trujillo stated that he met with Drs. Castaneda, Wallack, and other administrators and told them they had to lay off 10 people. Thereafter, Dr. Trujillo stated both that he was "generally present" and "in and out" during the discussions among his staff regarding the reorganization and the layoffs and that he agreed with Dr. Castaneda's description of what was said during those discussions.

The foregoing testimony of Dr. Castaneda and Dr. Trujillo concerning the selections of the doctors to be terminated simply cannot be reconciled, at least in the manner suggested by the witnesses. According to Dr. Trujillo he told Dr. Cancro the names of the doctors to be terminated on Monday, March 21, and informed Dr. Castaneda of the numbers of psychiatrists who needed to be terminated the following day. According to Dr. Castaneda, when he learned of the number of psychiatrists to be terminated, he and the other administrators engaged in a series of conversations which resulted in the selection of the reorganization plan and then the identities of doctors who were going to be discharged ostensibly because they did not fit into the plan's scheme.

This material conflict in the manner in which the doctors were selected for termination only makes sense if one concludes that Dr. Trujillo decided the identities of the doctors to be laid off, informed Dr. Cancro of his decisions and then told Dr. Castaneda the following day. Then, of course, Dr. Castaneda had to scramble to reassign doctors to the gaping vacancies created by the terminations. Hence, there was the assignment of a doctor-in-training, Dr. Stockfish, and a doctor "loaned" from the forensic unit Dr. Welner, to 18 South, one of the "intensive" units, which are the cornerstone of the Respondent's reorganization plan.

As noted above, other aspects of the doctors selected for termination vis-a-vis the plan just do not make sense otherwise. For instance, the Respondent closed only one unit but terminated four unit chiefs, all of whom had significant experience and expertise. This perhaps might make sense if the unit chiefs made considerably more money than the attendings but this defense was not offered by the Respondent, and no evidence concerning the salaries of any of the doctors was adduced. Also, Drs. Castaneda and Wallack testified that the number of nurses was a critical factor in selecting which reorganization plan was feasible but there was no testimony about the number of nurses assigned to the wards or whether any of them were terminated at the same time the psychiatrists were. Similarly, there was no explanation as to why the terminations had to be made in such a precipitous fashion, especially since the \$2 million "bot-

tom line" had been known for months. It is also implausible that the Respondent began making plans to reorganize the psychiatry department as much as 6 months before the terminations took place yet produced only one budget plan before such terminations and that the administrators involved all did not take any notes or did not review any notes before testifying in the instant proceeding.

The foregoing evidence shows that the Respondent's explanations for the terminations of the discriminatees completely lack credibility. The evidence further suggests that one person, Dr. Trujillo, ultimately decided who would be terminated and that such decisions were influenced by his animus against the Association and its leaders, Drs. Graham, Kermani, Portnow, Geller, Mahon, and Steiner.

The Respondent in its brief contests that the Association is a labor organization within the meaning of the Act. Although I did find the Association to be a labor organization under the Act, assuming arguendo that it had been found not to be, the evidence nevertheless clearly demonstrates that the Respondent violated Section 8(a)(1) of the Act by terminating Drs. Kermani, Portnow, Geller, Graham, Mahon, and Steiner because of their protected concerted activities on behalf of the psychiatrists at Bellevue.

Section 8(a)(1) of the Act prohibits employers from interfering, with, restraining, or coercing employees from acting together for mutual aid or protection or from engaging in other protected concerted activities. In order to establish a violation of Section 8(a)(1), it must be shown that the employee engaged in protected concerted activity, that the employer had knowledge of the concerted nature of such activity, and that the employee's protected activity was a "moving reason" in the employer's decision to take adverse action against the employee. See *Peter Vitalie Co.*, 313 NLRB 971, 975 (1994); *Manimark Corp.*, 307 NLRB 1059, 1061 (1992). See also *Wright Line*, supra.

Once the General Counsel establishes his burden of persuasion, the employer has the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Id.* I find that the Respondent has failed to carry its burden in this respect.

Of course, where the evidence shows the employer's motive to be unlawful and the employer's asserted reasons for its actions are pretextual, i.e., they do not exist or are not relied on, the Board is justified in concluding that the false reason was proposed to mask its unlawful reason and in relying upon such evidence to find a violation of the Act. *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *Golden Flake Snack Foods*, 297 NLRB 594, 595 fn. 2 (1990); and *Peter Vitalie Co.*, supra.

Concerted activity is activity engaged in "with, or on the authority of other employees, and not activity solely by and on behalf of the employee himself." *Manimark Corp.*, 307 NLRB 1059, 1061 (1992), citing *Meyers Yurosek & Son, Inc.*, 306 NLRB 1037 (1992) (spontaneous group protest to announcement of change in working hours found to be concerted activity).

In the case at bar, there is absolutely no question that the members of the Association, led by Drs. Graham, Kermani, Portnow, Geller, Mahon, and Steiner, engaged in protected and concerted activity throughout the life of the Association. Even after Dr. Trujillo refused to continue meeting with the Association. More recently, the record shows that the alleged

discriminatees mobilized the members of the Association into protesting the Respondent's 9 to 3 issue to the Respondent on behalf of the psychiatrists at Bellevue.

The analysis and conclusions set forth above concerning the terminations of the alleged discriminatees remain the same: the evidence conclusively demonstrates that said discriminatees were terminated because of their concerted activities on behalf of their fellow psychiatrists, thereby violating Section 8(a)(1) of the Act.

2. The Respondent's affirmative defenses

The Respondent asserts that four of the alleged discriminatees, Drs. Graham, Kermani, Geller, and Portnow were unit chiefs and as such, supervisory or managerial employees excluded from the coverage of the Act.

Section 2(11) of the Act provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, responsibility to direct them; or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).

The status of supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co.*, 175 NLRB 142 (1969); *International Longshoremen's Assn. v. Davis*, 476 U.S. 380, 396 fn. 13 (1986). It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act. *Advanced Mining Group*, 260 NLRB 486 (1982); *Magnolia Manor Nursing Home*, 260 NLRB 377 (1982). To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer statutory status. *NLRB v. Bergen Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982).

However, consistent with the statutory language and legislative intent, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *HS Lordships*, 274 NLRB 1167 (1985); *NLRB v. Wilson-Crissman Cadillac*, 659 F.2d 728 (6th Cir. 1981). Indeed, as the Court stated in *Beverly Enterprises v. NLRB*, 661 F.2d 1095 (6th Cir. 1981), "Regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor." Thus, the exercise of some supervisory authority in a merely routine, clerical perfunctory or sporadic manner does not elevate an employee into the supervisory

ranks," the test must be the significance of his judgment and directions. *NLRB v. Wilson-Crissman Cadillac*, supra; *Hydro Conduit Corp.*, 254 NLRB 433 (1991). Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. *NLRB v. Wilson-Crissman Cadillac*, supra.

Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees. *Federal Compress Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968). Additionally, the existence of independent judgment alone will not suffice for, "the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act." *Advance Mining Group*, 260 NLRB 486 (1982); *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331 (1st Cir. 1958). In short, "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former." *Advance Mining Group*, supra, *NLRB v. Security Guard Service*, 384 F.2d 1 (5th Cir. 1967). Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective.

The burden of proving that an employee is a "supervisor" within the meaning of the Act, rests on the party alleging that such status exists. *RAHCO, Inc.*, 265 NLRB 235 (1982); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). However, in *NLRB v. Health Care & Retirement Corp. of America*, 987 F.2d 1256 (6th Cir. 1991), the Sixth Circuit held that the General Counsel has the burden of establishing supervisory status. Where the possession of any one of the aforementioned powers is not conclusively established, or "In borderline cases" the Board looks to well-established secondary indicia, including the individual's job title or designation as a supervisor, attendance at supervisory meetings, job responsibility, authority to grant time off, etc., whether the individual possesses a status separate and apart from that of rank-and-file employees. *NLRB v. Chicago Metallic Corp.*, 794 F.2d 531 (9th Cir. 1986); *Monarch Federal Savings & Loan*, 237 NLRB 844 (1978); *Flex-Van Corp.*, 288 NLRB 956 (1977). However, when there is no evidence that an individual possesses any one of the several primary indicia for statutory supervisory status enumerated in Section 2(11) of the Act, the secondary indicia are insufficient by themselves to establish statutory supervisory status. *J. C. Brock Corp.*, 314 NLRB 157 (1994); *St. Alphonsus Hospital*, 261 NLRB 620 (1982).

In *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1178 (1994), the Supreme Court rejected the Board's "patient care" analysis test which found that a nurse's assignment and direction of other employees did not involve the exercise of supervisory authority because it stemmed from the nurse's professional judgment in the interest of patient care and was "not in the interest of the employer." Instead, the Court held that the Board must apply the statutory criteria set forth in Section 2(11) of the Act in the health care field in the same manner as any other industry.

In so doing, the Court set forth the test for determining whether an individual is to be deemed a supervisor. There is no reason that the test would be inapplicable to staff psychiatrists. Cf. *North General Hospital*, 314 NLRB 14 (1994)

(where the Board, 1 month after the decision in *Health Care Retirement Corp.*, held inter alia, that the director of psychiatric in-patient service for a hospital was not a supervisor where “there [were] no differences between his duties and those of [staff psychiatrists].” The Board noted: The mere fact that Dr. Robinson “monitors” certain procedures and “takes care of problems” does not establish that his interaction with the other professionals in the department raises the level of responsible direction. *North General Hospital*, 314 NLRB 14 (1994). Accordingly, we find that Dr. Robins is not a statutory supervisor.

The Supreme Court noted that in making a determination on the question of one’s supervisory status.

The statute requires the resolution of three questions, and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in one of the 12 listed activities [in section 2(11)]? Second, does the exercise of that authority require ‘the use of Independent judgment’? Third, does the employee hold authority ‘in the interest of the employer’? [114 S.Ct. at 1780.]

In *Providence Hospital*, 320 NLRB 717 (1996), the Board had occasion to review the Supreme Court’s decision and commented: When a professional gives directions to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give. For example, designing a patient treatment plan may involve substantial professional judgment, but may result in wholly routine direction to the staff that implements that plan. 320 NLRB at 12. See also *Nymed, Inc.*, 320 NLRB 806 65 fn. 10 (1996) (designing a plan of medical care is not an exercise of supervisory judgment). The Board further noted that the Supreme Court recognized the Board’s distinction between authority arising from professional knowledge and the “authority encompassing front-line management.” *Id.* The Board concluded, “We fully expect, therefore, that the analysis of most cases raising supervisory issues will be made pursuant to the Board’s traditional approach of analyzing whether the direction is done with independent judgment.” *Id.* at 13.

It is well settled that the job title “supervisor,” in and of itself, is an insufficient basis to qualify an individual as a supervisor within the meaning of Section 2(11) of the Act. Rather, it must be established that an individual exercises independent judgment in one or more of the powers enumerated in Section 2(11) of the Act. Accordingly, the exercise of supervisory judgment in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into supervisory ranks, the test of which must be the significance of the judgment and directions. *Lakeview Health Center*, 308 NLRB 75 (1992).

As indicated hereinbefore the burden of proving that an individual is a supervisor rests squarely on the party asserting that such status exists. *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979); *Ohio Masonic Home*, 295 NLRB 390 (1989). Whenever there is inconclusive or conflicting evidence on specific indicia of supervisory authority, the Board will find that supervisory status has not been established with respect to those criteria.

Based on the totality of the evidence, it is clear that the Employer has failed to show that the unit chiefs at Bellevue exercised independent judgment with regard to any of the factors establishing supervisory status under Section 2(11) of the Act.

Dr. Castaneda testified that he was a unit chief at Bellevue from 1987 until 1992. In his present capacity as the director of in-patient psychiatric services, Dr. Castaneda stated that unit chiefs serve as his immediate connection with the psychiatrists and physicians in training. Dr. Castaneda maintained that the unit chiefs are responsible for supervising from two to six or more physicians on his unit.³⁴ On cross-examination, Dr. Castaneda further testified that although the other ward personnel have departmental supervisors and are represented by unions, unit chiefs have the authority to, and routinely exercise such authority, to influence matters such as the hiring and firing of such personnel.

When he was a unit chief, Dr. Castaneda testified that he supervised several physicians and physicians in training, provided evaluations for them, recruited, interviewed and selected them for hiring, and initiated the termination of one of the doctors.³⁵ Dr. Castaneda further stated that he participated in the hiring of other persons in other disciplines, such as nursing and social work.³⁶

Drs. Graham, Kermani, Geller, and Portnow, all experienced unit chiefs, testified that they had no authority at all to hire, fire, or otherwise discipline employees.³⁷ However, Dr. Kermani testified that, in one instance, he was directed by Dr. Castaneda to sit and take notes during a “counseling” session held by Dr. Castaneda who later directed him to issue a counseling memorandum to the other doctor based on his notes. In another instance, Dr. Graham testified that on one occasion he and another doctor spoke to a prospective hire after he had been interviewed by the assistant director and that Dr. Graham subsequently told the assistant director that “the applicant seemed fine.”

Inasmuch as Dr. Castaneda’s testimony is completely unsubstantiated, the Respondent has clearly failed to show that unit chiefs have any authority whatsoever to hire, fire, or otherwise discipline employees. There was no evidence presented that unit chiefs possess the authority to transfer, lay

³⁴ The Respondent’s direct and cross-examination of witnesses on the supervisory issues was based, in part, on a unit chief job description which was undated. (P. Exh. 2.) Although Dr. Castaneda testified that the job description is maintained in a manual located in the nurse’s station on each unit, all of the unit chiefs who testified stated that they had never seen it before.

³⁵ Dr. Castaneda stated that his supervisor, Dr. Galanter, learned of the doctor’s subpar performance from other sources but relied on Dr. Castaneda’s assessment of the doctor’s performance.

³⁶ Dr. Joel Wallack, the Deputy Director, indicated that he oversees all hiring for the department of psychiatry. Dr. Wallack testified that he would ask the unit chief to participate in interviews or bring the candidate to meet the unit chief so that he could get the chief’s input before a final hiring decision was made. Dr. Wallack stated that the unit chief’s opinion would be given significant weight and that he did not recall one instance where they didn’t listen to a unit chief who opposed hiring a particular candidate.

³⁷ Shortly after Dr. Trujillo was hired, Dr. Geller testified that Dr. Trujillo asked him to be part of a committee which interviewed applicants for various administrative positions. There was no further evidence adduced concerning what input, if any, this committee had with respect to the selection of candidates.

off, or recall employees or to effectively recommend such action. Nor was evidence adduced that unit chiefs have the power to adjust employee grievances. With regard to the supervision of clinical activities, Dr. Castaneda stated that unit chiefs identified and implemented the philosophy of treatment on their units which included supervising the functioning of the attendings and the other disciplines.³⁸

In 1987, Dr. Castaneda stated that the unit chiefs distributed the case load according to the capabilities of the physicians and the balance of responsibilities such that the unit chief generally had less patients than the attendings. Because of their administrative responsibilities, Dr. Castaneda stated that he reduced the case load of the unit chiefs "as a rule." To the extent that such a rule is not followed, Dr. Castaneda stated it depends on the quality of the unit chief to exert control over his or her domain. "The better organized unit chief would make sure that there is an adequate reporting and assessment of each patient that comes in, and that those cases are distributed accordingly—It was routine that the strengths and weaknesses of the physicians were assessed at times of specific patient assignments."

The testimony of Drs. Kermani, Portnow, Geller and Graham all show that patient assignments are made by the nursing staff and are completely a matter of routine.

Dr. Castaneda further stated that as a unit chief, he was responsible for disseminating and instructing the rest of the staff of all disciplines as to the nature of new policies and regulations and for ensuring such were implemented. For example, Dr. Castaneda stated that unit chiefs are responsible for ensuring that the legal status of all the patients on the ward are monitored and complied with, that quality assurance standards are understood and followed, and that everyone on the ward participates in adequate treatment planning.

Dr. Castaneda testified that he holds unit chief meetings on Monday at 11 a.m. to discuss the managerial duties regarding functioning of each of the units and information which should bring the unit chiefs up-to-date as to the mission of the department which they are supposed to disseminate and implement on each of their respective units. Dr. Castaneda said that he also meets with each unit chief regularly depending on their level of functioning or seniority and that most of his communications with them occur verbally.

The testimony of the aforementioned witnesses for the General Counsel show that unit chiefs merely communicate the information disseminated in the unit chief meetings and, as discussed above, do not have any authority to ensure that any changes in hospital policies or procedures are followed by the attending psychiatrists on their unit.

Dr. Castaneda also testified that unit chiefs organize incident reviews so as to be able to respond to queries and explain the actions taken in a particular case to both internal and external sources. Dr. Castaneda further stated that unit chiefs serve as the "ultimate word" on the unit as to which clinical path to follow with a particular patient. Dr. Castaneda related that unit chiefs play a crucial role in the identification of problems and the implementation of solutions to quality of assurance issues such as length-of-stay or

restraint and seclusion matters, and are also responsible for ensuring that medical coverage is adequate on their units. Thus, according to Dr. Castaneda, the unit chief decides what mainly is best for the patients.

Although unit chiefs "sign off" on leave requests, the testimony of Drs. Graham, Kermani, Portnow, Geller, and Mahon show that attendings and unit chiefs regularly confer with each other to ensure that their vacation requests do not conflict and that as a practical matter, such conflicts do not occur and that unit chiefs routinely sign off on such requests. There was no probative evidence offered by the Respondent as to the existence of a conflict regarding vacation requests or any instance where such a request was refused. The testimony of Dr. Kermani and Dr. Graham further established that the administration was completely responsible for assigning so-called "moonlighters" to substitute for the unit chiefs and attendings on public holidays.

Dr. Graham, Portnow, Geller, and Kermani all testified that attendings and unit chiefs treat their patients independently and on occasion, confer in a collegial manner over treatment issues. Dr. Portnow also testified that he and the attendings on his ward have "brainstormed" over ways to help one of the attendings lower the length of stay of his patients. There was no testimony that unit chiefs regularly review the medical charts of the attending psychiatrists although the record appears to show that this was done to a limited extent to prepare for a review by the Joint Committee on the Accreditation of Hospitals (JCAHO).

In connection with the JCAHO review, the evidence shows that unit chiefs were directed to fill out evaluations of attending psychiatrists on their wards. However, there is no evidence that unit chiefs make specific recommendations for promotions, raises, discipline, or even continued employment. Inasmuch as there is no evidence that such evaluations affect employee status, such evaluations have clearly been held by the Board not to confer supervisory status. See *Passavant Health Center*, 284 NLRB 887 (1987); *Waverly-Cedar Falls*, 297 NLRB 390 (1989); *Ohio Masonic Home*, 295 NLRB 390 (1989). Moreover, the testimony of Drs. Kermani, Graham, and Portnow show that they were either directed as to the range of grades to be given or that their recommendations were completely ignored.

Dr. Castaneda stated that unit chiefs also coordinate the teaching activities on his unit, e.g., he will assign medical students to the attending best qualified to provide education and supervision.

Dr. Geller testified that he reviewed the medical charts of the residents and medical students, gave them advice, taught them and filled out evaluations of them. However, inasmuch as the Board has clearly held that interns and residents are not employees under the Act, such activities are not indicative of supervisory authority. See *North General Hospital*, 314 NLRB 14 (1994).

The Respondent introduced a unit chief job description into evidence. However, inasmuch as all the witnesses for the General Counsel who were former unit chiefs testified that they had never seen the job description and the Respondent adduced no probative extrinsic evidence supporting its use as establishing the "supervisory" duties as listed therein, I do not find it supportive of the Respondent's contention as to supervisory status. However, this job description does contain some supervisory criteria.

³⁸ In a memorandum dated October 12, 1992, and addressed to all unit chiefs, Dr. Castaneda (and the directors of the other disciplines) mandated, in his own words, "a basic core of therapeutic activities" that were to be conducted on the wards.

The Respondent may contend that unit chiefs are generally regarded, even by themselves as supervisors, who are in charge of their units. However, such an argument is misplaced, for it is well established that the subjective perceptions of others are not dispositive with respect to determinations of supervisory status by the Board. See *Blue Star Ready-Mix Concrete*, 305 NLRB, 429, 430 (1991) (employer holding out of individual as supervisor not dispositive of issue).

In sum, the record shows that the Respondent has not carried its burden of adducing probative evidence to show that unit chiefs satisfy any of the criteria enumerated in Section 2(11) which would qualify them as "supervisors" under the Act. In applying the analysis set forth in cases such as *Providence Hospital*, supra; *Ten Broeck Commons*, 320 NLRB 806 (1996). Also see *Parkview Manor*, 321 NLRB 477 (1996).

The Respondent also asserts as an affirmative defense that all six alleged discriminatees were faculty members and, therefore, excluded from the coverage of the Act as managerial employees.

The Act does not explicitly state that managerial employees shall be excluded from the protection of the Act. However, in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the Supreme Court stated that managerial employees must be excluded from the protection of the Act. Moreover, in *Bell Aerospace*, 219 NLRB 384 (1975), the Board on remand citing *Eastern Camera & Photo Corp.*, 140 NLRB 569 (1962), and *General Dynamics Corp.*, 213 NLRB 851 (1974), defined managerial employees as follows:

[T]hose who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs and independent of their employer's established policy.... [M]anagerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather it is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management.

NLRB v. Yeshiva, 444 U.S. 672 (1985), marked the first case in which the Supreme Court extended the managerial exclusion to college faculty members. In *Yeshiva* the Court held that full-time faculty members at Yeshiva, a large private university, were managerial employees and thus outside the protection of the Act. In doing so, the Court stressed that its holding did not extend to all professors. Therefore, the issue of a college faculty's status, as either managerial employees or employees, is fact specific.

In *Yeshiva*, the Court maintained that the faculty's duties constituted the essential managerial functions of a university. The Court maintained that this was evidenced by the fact that

[the faculty members'] authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. . . . To the extent the industrial analogy applies, the faculty determines . . . the product

to be produced, the terms upon which it will be offered, and the customers who will be served. [Id. at 688.]

That *Yeshiva's* administration could veto faculty decisions was not dispositive to the Court. The Court rejected the contention that this reservation of authority rendered the faculty's rule advisory rather than managerial.

Where the Board has conferred managerial status upon faculty members, the faculty have effective control over course offerings and scheduling, the general structure of the curriculum, and standards governing the admission, retention, and graduation of students. See *Livingstone College*, 286 NLRB 1308 (1987). *American International College*, 282 NLRB 189 (1986); *University of New Haven*, 267 NLRB 939 (1983). Additionally, these cases attributed managerial status based on faculty influence in decisions regarding appointment promotion and tenure. Id. That the faculty's decisions may be reviewed by the administration need not preclude a finding of managerial status. In *University of Dubuque*, 289 NLRB 349 (1989), the Board conferred managerial status despite evidence that the administration vetoed a majority of the faculty members' recommended decisions.

Where faculty members have been afforded protection under the Act, the Board has relied on the fact that the administration either unilaterally or effectively made the decisions essential to university operations. Decisions involving personnel may fall into this category. In *Florida Memorial College*, 263 NLRB 1248, 1254 (1982), enfd., 820 F.2d 1182 (11th Cir. 1987), the Board found faculty members to be employees where the administrators hired professors without faculty participation. Faculty authority was deemed to be merely "a sophisticated version of the familiar suggestion box." Id. at 1252. Similarly, in *Loretto Heights College v. NLRB*, 742 F.2d 245 (10th Cir. 1984), the Board held that faculty members were not managerial employees, noting that faculty recommendations were afforded little weight by the administration when making personnel decisions.

In *Kendall School of Design*, 279 NLRB 281 (1986), the Board held the faculty to be employees where the faculty were unable to determine course content and texts. Also see *Cooper Union of Science & Art*, 273 NLRB 1768 (1985) (Board held that faculty members were employees where the University Trustees restructured academic organization without faculty participation and over strong faculty opposition), enfd. 783 F.2d 29 (2d Cir. 1986), cert. denied 479 U.S. 815 (1987).

Additionally, the Board has found faculty members to be employees where professors lack control over major financial decisions affecting the university. See *Cooper Union*, supra at 1773; *Florida Memorial College*, supra at 1249.

Unlike *Yeshiva* and its progeny, the clinical psychiatrists at Bellevue are not "full-time" faculty members. Nor are they otherwise educationally related personnel whose collegial authority with respect to academic matters was deemed to be so closely connected with the "business" of the university that these decisions constituted governance of the institution. *Montefiore Hospital & Medical Center*, 261 NLRB 569 (1982). Rather, they are full-time clinical psychiatrists who are affiliated with the Respondent's School of Medicine solely as an outgrowth of their employment by Respondent at NYU. They are not on the Medical School's tenure track nor is there any evidence that they participate on committees

which decide or effectively recommend course content, teaching methods, grading policies, matriculation standards, admission standards, degree requirements, the size of the student body, the tuition to be charged, etc. See also *Lewis & Clark College*, 300 NLRB 155 (1990). Nor was there any probative evidence adduced by the Respondent showing that the clinical psychiatrists employed at Bellevue by the Respondent formulate or effectuate employer policies with respect to employee relations matters. See *North Arkansas Electric Cooperative*, 185 NLRB 550 (1970).

Based on the foregoing, the record fails to establish that the clinical psychiatrists at Bellevue are "managerial" employees and excluded from the protection of the Act.

For the last affirmative defense the Respondent asserts that all actions complained of were dictated by the New York City Health and Hospitals Corporation, a governmental agency not subject to the coverage of the Act. To the extent that the Respondent performed a governmental function on behalf of the HHC, or acted under the direction and control of the HHC, it also was not subject to the coverage of the Act.

In *Res Care, Inc.*, 280 NLRB 670 (1986), the Board held that, in deciding whether to assert jurisdiction over an employer with close ties to an exempt government entity, it would examine the control over essential terms and conditions of employment retained by both the employer and the exempt entity to determine whether the employer is capable of engaging in meaningful collective bargaining. 280 NLRB at 672.

In *Management Training Corp.*, 317 NLRB 1355 (1995), the Board overruled *Res Care*. In doing so, the Board established a new test for asserting jurisdiction over employers that operate under contracts with government entities:

[I]n determining whether the Board should assert jurisdiction, the Board will only consider whether the employer meets the definition of "employer" under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards.

Section 2(2) of the Act excludes from the term "employer" both Federal and state governmental entities as well as "political subdivisions thereof." There is no evidence in the record however, that the Respondent is exempt from the Board's jurisdiction on this basis. Moreover, I have found above that the Respondent annually derives gross revenues in excess of 500,000 annually in the conduct of its business operations and purchases and received at its New York facilities goods and supplies valued in excess of 50,000 directly from points outside the State of New York. I therefore find that the Respondent is an employer within the meaning of Section 2(2) of the Act and subject to the coverage of the Act.³⁹

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent, set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close and inti-

mate relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully terminated Drs. Kermani, Graham, Geller, Steiner, Portnow, and Mahon, the Respondent shall be ordered of offer them immediate reinstatement to their former positions, discharging if necessary any replacement hired since their termination, and that they be made whole for any loss of earnings or other benefits by reason of the discrimination against them in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1980), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Because of the nature of the unfair labor practices found herein, and in order to make affective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. The Respondent, New York University Medical Center, A Division of New York University, is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. Moreover, based upon the record and admitted facts it will effectuate the purposes of the Act for the Board to assert jurisdiction over the Respondent herein.

2. The Association of Staff Psychiatrists is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, in violation of Section 8(a)(1) of the Act, has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act by impliedly threatening its employees with cutbacks, layoffs and other consequences if they continued to protest the announced discontinuance of the Respondent's policy and practice of allowing employees to work at Bellevue 9 a.m. to 3 p.m. with credit for on-call and other off-site research duties.

4. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by terminating Drs. Kermani, Graham, Geller, Steiner, Portnow, and Mahon because they protested the changes in the 9 a.m. to 3 p.m. work hours, joined, supported or assisted the Association, and engaged in concerted activities concerning terms and conditions of employment, or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and has thereby discriminated, and is discriminating, in regard to the hire or tenure or terms or conditions of employment of its employees.

³⁹ See *NLRB v. Natural Gas Utility of Hawkins County*, 402 U.S. 600, 604-605 (1971); *Concordia Electric Corp.*, 315 NLRB 752 (1994); *Fayette Electrical Cooperative*, 308 NLRB 1071 (1992).

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁰

ORDER

The Respondent, New York University Medical Center, a Division of New York University, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly threatening its employees with cutbacks, layoffs, and other consequences if they continue to protest the announced discontinuance of the Respondent's policy and practice of allowing employees to work at Bellevue 9 a.m. to 3 p.m. with credit for on-call and other off-site research duties.

(b) Terminating employees because they protested the changes in the 9 a.m. to 3 p.m. hours and joined, supported or assisted the Association, and engaged in concerted activities concerning terms and conditions of employment or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of these Order, offer Drs. Ebrahim, Kermani, John Graham, Martin Geller, Jerome Steiner, Stanley Portnow, and Maeve Mahon full reinstatement to their former positions, or if their jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Drs. Kermani, Graham, Geller, Steiner, Portnow, and Mahon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge will not be used against them in any way.

(d) Preserve and, within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in New York, New York copies of the attached notice marked "Appendix."⁴¹

Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 29, 1995.

(f) Within 14 days after the service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁴¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT impliedly threaten our employees with cutbacks, layoffs and other consequences if they continue to protest the Respondent's announced discontinuance of its policy and practice of allowing employees to work at Bellevue from 9 a.m. to 3 p.m. with credit for on-call and other off-site research duties.

WE WILL NOT terminate employees because they joined, supported, or assisted the Association or any other labor organization and engaged in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Drs. Ebrahim Kermani, John Graham, Stanley Portnow, Martin Geller, Maeve Mahon, and Jerome Steiner full reinstatement to their former jobs or, if these jobs no

⁴⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Drs. Kermani, Graham, Portnow, Geller, Mahon and Steiner whole for any loss of earnings and other benefits resulting from their unlawful discharges, less interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Drs. Kermani, Graham, Portnow, Geller, Mahon and Steiner, and WE WILL within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

NEW YORK UNIVERSITY MEDICAL CENTER, A
DIVISION OF NEW YORK UNIVERSITY